80-1823

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,

and

METAL TRADES DEPARTMENT, AFL-CIO, *et al.*,
Petitioners,

v.

DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

In recent years, both Congress and the Executive Branch have sought to reduce federal expenditures by limiting the salary and wages of federal employees. One technique, a legislative "pay cap" included as a provision within an appropriations bill, has been used in an attempt to limit the annual wage increases which federal employees otherwise would receive by virtue of pay mechanisms prescribed by substantive legislation. The questions presented by this petition relate to the rights of federal employees and, conversely, the obligations of the federal government, as their employer, when the government, based upon the enactment of a legislative pay cap, seeks to forestall or prevent the statutory wage increases from taking effect. At issue in this particular case is the entitlement of certain blue-collar employees within designated localities to receive wage increases under the prevailing rate statute (5 U.S.C. §§ 5341-5350), when a "cap" does not become law until after the date on which the employees would have received a prevailing rate increase. 5 U.S.C. § 5344. Under the pay cap, which was applicable to fiscal year 1979 (October 1, 1978 through September 30, 1980) and became law on October 10, 1978, the employees were restricted to pay increases of 5.5 percent above the employees' then current wage rates. But for this limitation, the employees, by operation of the prevailing rate statute, would have received wage increases, *effective prior to October 10, 1978*, that had been computed in accordance with the prescribed statutory procedures. Thus, but for the purported pay cap, the employees would have received statutory wage increases ranging from 7 to 12 percent above their then current

wage rates. Under these circumstances, the following questions are presented by petitioners: *

1. Whether Congress, by enactment of the pay cap, evidenced a manifest intent to limit increases which the employees otherwise would have received under the prevailing rate statute.

2. Assuming *arguendo* that Congress intended to cap the pay of the employees, whether the pay increases for the employees became effective prior to the date on which the pay cap became law, rather than upon subsequent action by agency-employers ordering the pay increases.

3. Whether employees, once a pay increase has vested by operation of the prevailing rate statute, are constitutionally protected against the reduction of such increases by a pay cap which later becomes law.

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* Petitioners include the following: American Federation of Government Employees, AFL-CIO, Metal Trades Department, AFL-CIO, Adolphus Battle, Wallace O. Brannan, Jack Daniels, Jr., Freddy R. Davidson, Noble R. Dean, Marvin Dunn, David O. Heritage, Laranese M. Hinriches, George Holland, William H. Kent, William C. Massey, Louis F. Mayers, Coy Murdock, Charles E. Nobles, John M. Simonsen, Robert Sniff, John Swan, Jr., and Boyd Woolridge. The parties aligned below against petitioners include: Alan K. Campbell, Chairman, U.S. Civil Service Commission (CSC); Jules Sugarman, Vice Chairman, CSC; Ersa Poston, Member, CSC; Harold Brown, Secretary of Defense; John Stetson, Secretary, Department of the Air Force; Clifford L. Alexander, Jr., Secretary, Department of Army; W. Graham Claytor, Jr., Secretary, Department of Navy; Robert Bergland, Secretary, Department of Agriculture; and Max Cleland, Administrator, Veterans' Administration.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRELIMINARY STATEMENT

The petitioners—American Federation of Government Employees, AFL-CIO, Metal Trades Department, AFL-CIO, Adolphus Battle, Wallace O. Brannan, Jack Daniels, Jr., Freddy R. Davidson, Noble R. Dean, Marvin Dunn, David O. Heritage, Laranese M. Hinriches, George Holland, William H. Kent, William C. Massey, Louis F. Mayers, Coy Murdock, Charles E. Nobles, John M. Simonsen, Robert Sniff, John Swan, Jr., and Boyd Woolridge—pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this pro-

ceeding on December 18, 1980, and the Court's denial, on February 6, 1981, of petitioners' request for rehearing.[1]

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-14a) is not yet reported. The opinion and order of the District Court for the District of Columbia (App. C, *infra*, 17a-25a) is reported at 474 F. Supp. 357 (D.D.C. 1979).

JURISDICTION

The judgment and opinion of the Court of Appeals for the District of Columbia Circuit was entered on December 18, 1980. A timely petition for rehearing with a suggestion that the case be reheard *en banc* was denied on February 6, 1981 (App. B, *infra*, 15a, 16a), and this petition for rehearing was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] The captions below read *American Federation of Government Employees, AFL-CIO, et al.* v. *Alan K. Campbell, Chairman, U.S. Civil Service Commission, et al.*, (Nos. 79-2024, 79-2136) and *Metal Trades Department, AFL-CIO, et al.* v. *Alan K. Campbell, Chairman, U.S. Civil Service Commission, et al.*, (Nos. 79-2025, 79-2137). The cases had been consolidated in U.S District Court and on appeal. The Office of Personnel Management, insofar as relevant to this petition, has become the successor-agency to the U.S. Civil Service Commission (CSC). In addition to Mr. Campbell, respondents include the following officers of the United States or their successors: Jules Sugarman, Vice Chairman, CSC; Ersa Poston, Member, CSC; Harold Brown, Secretary of Defense; John Stetson, Secretary, Department of the Air Force; Clifford L. Alexander, Jr., Secretary, Department of Army; W. Graham Claytor, Jr., Secretary, Department of Navy; Robert Bergland, Secretary, Department of Agriculture; and Max Cleland, Administrator, Veterans' Administration.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

This case involves the federal prevailing rate statute, 5 U.S.C. §§ 5341-5350; implementing regulations of the Office of Personnel Management, Federal Personnel Manual Supplement 532-1, CSC Bulletin 532-30 (October 20, 1978); the Treasury, Postal Service, and General Government Appropriations Act, 1979, 92 Stat. 1001; and the Fifth Amendment to the Constitution of the United States. The pertinent provisions are set forth in Appendix E, *infra*, 49a-72a.

STATEMENT OF THE CASE

The individual petitioners are federal blue-collar employees, working in six geographical "wage areas" whose pay rates[2] are established in accordance with the federal prevailing rate statute, 5 U.S.C. §§ 5341-5350.[3] (App. A, *infra*, 3a). During July 1978, wage surveys were initiated in each of the wage areas. As a result of these surveys, wage increases ranging from 7 to 12 percent were to take effect on October 1 or October 8, 1978.[4]

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[2] The prevailing rate statute and applicable regulations (Federal Personnel Manual Supplement 532-1) provide detailed procedures to establish, on a regular and fixed basis, pay rates for federal blue-collar employees in line with the pay of their private sector counterparts in the trades and crafts. The rates are based upon data obtained by formal survey of private sector pay within designated wage areas. (App. A, *infra*, 3a, 4a).

[3] The pay rates of blue-collar employees in other wage survey areas were not in dispute. (App. A, *infra*, 4a, n.3). (At the time pertinent to this case, there were about 140 such wage areas. See FPM Supp. 532-1, App. D). Similarly, the pay rates of general schedule and other federal employees in other pay categories were not in dispute. (App. A, *infra*, 4a, n.3).

[4] The effective dates varied among the wage areas (App. A, *infra*, 4a, n.3); the dates were established by operation of 5 U.S.C. § 5344 which pegs the "effective date" of a wage increase to the expiration of a "45-day period" which begins to run upon the initiation of a wage survey.

(*Id.*, 5a). The employees, however, never received these survey-determined increases. Instead, they received increases of 5.5 percent above their then current wages, retroactive to the October 1 and October 8 "effective dates." (*Id.*, 6a).

The 5.5 percent increases were derived from a provision within the general appropriations act for fiscal year 1979[5] (*Id.*, 5a, 6a), which purported to generally limit or "cap" federal wages and salaries at the 5.5 percent level during the 1979 fiscal year. The appropriations bill was signed into law on October 10, 1978, *i.e.*, after the "effective dates" of the survey-determined wage increases of 7 to 12 percent. (*Id.*). In anticipation of the pay cap becoming law, the employer-agencies within the six wage areas held off implementing the wage increases, even though the "effective dates" of the wage increases had passed. (*Id.*, 5a). Thus, at the time the bill was signed into law, no employer-agency had issued an order directing payment of the statutorily-determined wage increases. (*Id.*). On October 20, 1978, the Civil Service Commission (CSC) issued a directive advising agencies that the 5.5 percent limitations should be applied to wage increases with an effective date of October 1, 1978 or later.[6] (*Id.*). Thereafter, the employer-agencies issued wage schedules, establishing increases of 5.5 percent to be paid retroactively to the October 1 and October 8 dates. (*Id.*, 6a).

The American Federation of Government Employees, AFL-CIO, and the Metal Trades Department, AFL-CIO, on behalf of the employees within the six localities, ini-

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[5] Treasury, Postal Service, and General Government Appropriations Act, 1979, Pub. L. No. 95-429, 92 Stat. 1001, at section 614(a), 92 Stat. 1018.

[6] CSC Bulletin 532-30. On January 1, 1979, the Civil Service Commission was replaced, in part, by the Office of Personnel Management. (App. A, *infra*, 5a, n.7).

tiated suits seeking to obtain the wage increases in the amounts determined under the prevailing rate statute. The actions were brought pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1361, and the Fifth Amendment of the Constitution of the United States. Upon cross-motions for summary judgment, the District Court held that the employees had a "vested statutory right to receive the full amount of the survey determined wage increases [from the effective date of the increase] until October 10, 1978 when the President signed the pay cap into law." (App. C, *infra*, 22a).

In this regard, the District Court stated:

> [The employees'] right to receive the adjusted pay rates vested on the effective date of the raises pursuant to § 5344(a), before the pay cap became law. [The agency-employer's] duty to implement the wage increases on the effective dates . . . was ministerial. The public interest exception may not be applied retroactively to disrupt the entire wage scheme set forth in the [prevailing rate statute]. [T]o allow [agency-employers] to deprive [the employees] of pay due for services already performed but still owing would present serious Constitutional questions. *United States* v. *Larionoff*, 431 U.S. 864 (1977). [Footnote omitted].

(*Id.*).

However, the District Court held that "Congress has the authority to reduce the pay of the [employees] prospectively without interfering with any of their Constitutional rights." (*Id.*, 23a). Thus, the District Court held that the wage increases were lawfully reduced to 5.5 percent after October 10, 1978.

Upon the basis of cross-appeals, the Court of Appeals affirmed the District Court decision insofar as it held that the wages were capped after October 10, 1978, and it reversed the decision insofar as it held that the employees had a vested right to uncapped wage increases

between the effective dates of the statutory increases and the date when the pay cap was signed into law. (App. A, *infra*, 14a). In reaching this decision, the Court concluded: (1) Congress, by enactment of the pay cap statute, effectively modified the prevailing rate statute, thereby limiting increases to 5.5 percent during fiscal year 1979, (*Id.*, 13a, 14a); and (2) the use of the phrase "public interest" in the prevailing rate statute confers some discretion or flexibility upon agency officials and thereby precludes employees from obtaining a vested right to a wage increase until an agency actually issues an order fixing the wage increase. (*Id.*).[7] A petition for rehearing with a suggestion that the case be reheard *en banc* was denied on February 6, 1981. (App. B, *infra*, 15a, 16a).

REASONS FOR GRANTING THE PETITION

In recent years, Congress and the Executive Branch have sought to reduce federal expenditures by attempting to avoid the operation of statutory mechanisms for set-

[7] The Court of Appeals refrained from attempting to delineate, in this case, the limits of such discretion. However, in its opinion in *National Federation of Federal Employees, Local 1622* v. *Brown*, No. 79-2394 (D.C. Cir.), entered on February 18, 1981—not yet reported (App. D, *infra*, 26a-48a)—the Court of Appeals held, in part, that an agency's discretion to fix and adjust blue-collar pay rates is circumscribed by the principles enumerated in 5 U.S.C. § 5341: (1) equal pay for equal work in federal agencies within the same locality; (2) differences in pay for substantial differences in responsibilities and qualification requirements; (3) rates of pay maintained in line with rates paid locally for comparable work in the private sector; and (4) rates of pay at a level which attracts and retains qualified employees. (*Id.*, 28a, 29a). The Court's opinion, however, gives no guidance as to the time frame, if any, in which an agency must exercise its purported discretion to set pay rates. Although *Brown* involves a group of federal employees not covered by the pay cap legislation, the case originated out of an attempt by the Executive Branch to cap all federal pay at 5.5 percent during the 1979 fiscal year. (*Id.*, 30a-33a).

ting the pay of federal employees. They have sought to achieve these objectives by signing into law, as part of the appropriations process, ceilings or "caps" to be imposed upon salary increases.[8] Such provisions have become law at the last moment before pay increases would take effect under the statutory mechanisms or, as in the present case, after the pay increases had taken effect. Petitioners do not challenge the rights of Congress and the Executive Branch to undertake *timely* action, by amendment or repeal of statutory pay mechanisms, to limit the pay of federal employees. While petitioners submit that such action is unfair to federal employees and detrimental to the public welfare, petitioners do not challenge the right of the federal government to undertake such action so long as it does not divest the employees of rights they already have acquired by operation of existing statute. However, the decision by the Court of Appeals permits such a result.

In the particular facts of this case, the decision has permitted agency-employers to divest the blue-collar employees of the pay increases they already had acquired under the prevailing rate statute. And, in future situations, the decision permits agency-employers (1) to delay, without limitation, the implementation of wage rates already computed in accordance with the prevailing rate statute, and (2), in so doing, to utilize subsequently enacted pay cap legislation to deny the employees the prevailing rate increases. As a result of the decision, more than 600,000 employees[9] have been denied their

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[8] See Joint Resolution Making Continuing Appropriations for the Fiscal Year 1981, Pub. L. No. 96-369, 94 Stat. 1351, section 114, 94 Stat. 1356; and Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559, section 613, 93 Stat. 576.

[9] About 500,000 of these employees are paid through appropriated funds. OFFICE OF PERSONNEL MANAGEMENT, EMPLOYMENT AND TRENDS AS OF DECEMBER 1980, FEDERAL CIVILIAN WORKFORCE

plain statutory right to receive, absent timely amendment of the statute, a salary computed in accordance with the objective mechanisms prescribed by the prevailing rate statute and payable to them at fixed, regular intervals.

Earlier this term, this Court had the opportunity in *United States* v. *Will*, —— U.S. ——, 101 S. Ct. 471 (1980) to address one aspect of the problem presented by last-minute attempts to avoid operation of the statutory pay mechanisms, *i.e.*, the effect of legislated pay caps upon the entitlement of the federal judiciary to salary increases computed in accordance with antecedent statute. In *Will*, this Court held that federal judges were entitled to salary increases if legislation containing a cap on such increases was not signed into law before the effective date, under the antecedent statute, of the salary increases. However, since the Court's decision involves the interpretation of statutory provisions relating to judicial pay,[10] this Court's decision, although instructive, may not be controlling on the questions presented by this case. Petitioners, in their request for rehearing to the Court of Appeals, argued that the crux of this Court's opinion in *Will* was that federal employees acquire a vested right to a salary increase, as determined by the prescribed statutory mechanism, upon a definite date, again as prescribed by statute, not upon the issuance of an administrative order directing payment. Further, petitioners noted that although different statutes were at

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MONTHLY RELEASE, FEBRUARY 1981. About 100,000 employees are paid through non-appropriated funds. WAGE FIXING AUTHORITY, DEPARTMENT OF DEFENSE, PERSONNEL INVENTORY REPORT.

[10] See 101 S. Ct. at 474, for a discussion of the interlocking network of statutes fixing the compensation of federal judges. In this regard, it should be noted that under 28 U.S.C. § 461 the salaries of the federal judiciary are fixed in accordance with the statutory procedures for establishing General Schedule (federal white-collar) pay. 5 U.S.C. § 5301 *et seq.*

issue, the only difference between the two statutory schemes was the use of the "public interest" language in the prevailing rate statute. While petitioners submit that the use of the "public interest" language in the prevailing rate statute should not justify a departure from this Court's ruling, we submit that the issue warrants resolution by this Court. In this connection, petitioners wish to emphasize that if the decision below is allowed to stand, federal blue-collar employees—alone among all the major categories of federal civilian employees—may be denied an entitlement to salary increases simply by an agency's delay in issuing an order directing the payment of a pay increase.[11] For these reasons, along with the reasons stated below, review by this Court is warranted.

1. The opinion below is contrary to the plain language of the prevailing rate statute, its purpose, and its legislative history.

The statute, in brief, provides that: (1) rates of pay for the subject employees are to be set in accordance with prescribed procedures; (2) rates are to be set in accordance with prevailing rates in similar private sector occupations; (3) adjustments to the rates are to be made periodically; and (4) rates are to be set "as nearly as is consistent with the public interest." 5 U.S.C. §§ 5341, 5343(a). The statute confers authority upon the Office of Personnel Management to prescribe procedures whereby "[agencies] shall conduct wage surveys, analyze wage survey data, and develop and establish appropriate wage schedules and rates for prevailing rate employees." 5 U.S.C. § 5343. Furthermore, the statute prescribes definite time limits for the effectuation of the survey-determined wage rates.

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[11] Petitioners submit that given the direct connection between General Schedule and judicial pay, this Court's decision in *Will* protects federal white-collar employees against a retroactive diminution of wage increases that have been set by the applicable statutory mechanism. See note 10, *supra*.

Section 5344(a) reads in part:

> Each increase in rates of basic pay granted, pursuant to a wage survey, to prevailing rate employees is effective not later than the . . . 45th day . . . following the date the survey is ordered to be made.

This requirement is implemented by the controlling OPM regulations which read, in pertinent part:

> TIME LIMITATIONS FOR
> EFFECTING WAGE SURVEY RESULTS
>
> a. *Statutory time limits.* Each increase in rates of basic pay granted pursuant to a wage survey is required to be placed into effect for all wage employees . . . whether employees of the lead agency or other agencies, not later than the . . . 45th day . . . following the date on which the wage survey was ordered to be made. (5 U.S.C. § 5344).

FPM Supp. 532-1, S5-15.

Petitioners submit that upon the expiration of the 45-day period prescribed by 5 U.S.C. § 5344, the employees acquired a vested right to the survey-determined wage increases. The Court of Appeals, however, did not view section 5344 as conferring an entitlement upon employees. Rather, the Court viewed section 5344 as somehow qualified by the "public interest" language within 5 U.S.C. §§ 5341 and 5343(a). In this regard, the Court held that the "public interest" language provided agency officials with sufficient discretion and "flexibility in setting wage increases [such that] blue collar wages cannot be fixed until the agency issues an implementing order on the operative date." (App. A, *infra*, 13a). The Court continued: "Only when the agency fixes and orders a raise do workers acquire a vested right to that raise." (*Id.*). The Court defined "operative date"—which nowhere appears as a term in either the prevailing rate statute or implementing regulations—as "the date on

which the agency actually issues an order setting the amount of the wage increase [which] may come either before or after the effective date." (*Id.*, 11a).

The Court clearly erred in reaching this conclusion. The "public interest" language cannot reasonably be read to qualify the language of 5 U.S.C. § 5344(a) that "each increase in rates of basic pay granted, pursuant to a wage survey . . . is effective not later than the 45th day . . . following the date the survey is ordered to be made." Furthermore, the Court's conclusion is directly contrary to both (1) the purpose for which 5 U.S.C. § 5344 was enacted, *i.e.*, to provide employees with pay increases within a regular and definite period of time, and (2) the overall purpose of the prevailing rate statute, *i.e.*, to provide employees with a prevailing wage so as to achieve comparability with private sector employees in like occupations. In this regard, the House Report stated:

> [The purpose of the time limits] is to bring wages . . . more closely in alinement with those being paid in private industry and will tend to keep them from lagging too far behind at any time.

H.R.REP. NO. 2207, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 5107.

The Report continues:

> Heads of departments and agencies employing [blue-collar employees] will assure that wage surveys and other administrative steps required before the issuance of a wage schedule are expedited so that the time limits specified . . . will not be exceeded.[12]

Id.

In expressing the need for an automatic effective date, one proponent stated:

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[12] See also *Secretary of Interior*, B-138063, 38 Comp. Gen. 538, 541 (1959). (The purpose of the "45-day" language was to "eliminate undue delays in effecting wage adjustments.")

> I dislike to say it but it seems that some agencies string the process out in order to keep from putting into effect the increase to which the workers are clearly entitled.

102 CONG. REC. 12807 (1956). Obviously, this purpose is defeated if the section is given a gloss that agencies can postpone the effective date of a wage increase, upon grounds of "public interest," until some uncertain future date at which time an agency-employer can invoke the "public interest" and require that the prevailing rate increases be scrapped.

The decision by the Court also overlooks the employees' contention that the effect of Pub. L. No. 92-392, 86 Stat. 564 (an amendment to the prevailing rate statute) was to eliminate virtually all discretion from agency-employers. Until the enactment of Pub. L. No. 92-392 and the issuance of applicable CSC regulations, the sole guidance provided agencies consisted of the following statement within 5 U.S.C. § 5341, as amended by Pub. L. No. 89-554, 80 Stat. 471: "The pay of [blue-collar employees] shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates"—the provision upon which the Court's decision is based. None of the detailed requirements, now codified at 5 U.S.C. §§ 5341-5343, then existed. The lack of any discretion is demonstrated clearly within the minority report on Pub. L. No. 92-392, which reads:

> [This bill] proposes to . . . write into law a rigid, cumbersome, and inflexible set of national pay setting procedures . . . . *The bill effectively locks into statute every conceivable procedure and policy for pay setting purposes.* Any future adjustments or "fine-tuning" of the system will require endless enactments by the Congress. [Emphasis added.]

H. R. REP. No. 92-339, 92d Cong., 1st Sess. 52 (1971).

The minority was correct. Pub. L. No. 92-392 did establish an "inflexible set of national pay setting pro-

cedures," and in fact did lock ". . . into statute every conceivable procedure and policy for pay setting purposes," thereby eliminating the discretion, "in the public interest," as a means of avoiding the payment of a prevailing rate increase. The contrary conclusion by the Court of Appeals, therefore, is clearly wrong.

2. The interpretation given the prevailing rate statute by the Court below will permit agency-employers to apply a cap not only to pay increases otherwise becoming due to employees during the fiscal year for which the pay cap was designed, but will enable agency-employers to withhold increases that would become due during the *preceding* fiscal year. Congress, in recent years, has chosen to word legislated pay caps in much the same manner as it did in this case.[13] The core language of the pay caps provides:

> No part of any funds appropriated for the [subject] fiscal year . . . may be used to pay the salary of any individual . . . in an amount which exceeds the rate of salary or basic pay payable . . . on [the last date of the preceding fiscal year] by more than [x] percent, as a result of *any adjustments which take effect during* [*the subject*] *fiscal year* under—
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> * * * * *
>
> (3) Section 5343 of title 5 . . . if such an adjustment is granted pursuant to a wage survey. . . . [Emphasis added.]

Although, by its terms, such a pay cap would only apply to the "subject" fiscal year, the decision by the Court of Appeals permits agency-employers, merely by delaying the "operative date" of a wage increase, to deny employees a wage increase established in accordance with the prevailing rate statute. This result is achieved because the Court has determined that 5 U.S.C. § 5344

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[13] See note 8, *supra*.

does not operate so as to create a vested right to an increase upon the expiration of the 45-day period set forth in that statutory provision. To use an example, the decision by the Court of Appeals would have permitted an agency whose employees last received a wage increase in April 1977 to deny them a prevailing rate increase, based upon a pay cap legislation which would not take effect until October 1978. Continuing with this example, it should be noted that, in accordance with the prevailing rate statute (1) a wage survey likely would have been initiated about February 1978; and (2) the employees would have received the prevailing rate increase, effective upon the expiration of the prescribed 45-day period—sometime in April 1978. However, since the Court of Appeals held that employees do not acquire a right to such statutory wage increases until a so-called "operative date"—according to the Court the date on which an agency orders the payment of the increase—the agency, merely by delaying such action until the pay cap becomes law, can avoid the statutory pay mechanism.[14] Instead of paying the employees a prevailing wage, an agency, by delaying its action, can limit increases to a "capped" amount. Such a result, of course, completely frustrates the purpose underlying 5 U.S.C. § 5344—to expedite and regularize prevailing rate increases.[15] Furthermore, the decision by the Court of Appeals, in effect, sanctions the repeal of existing law by retroactive application of a later statute. This result, petitioners submit, violates the employees' property rights.[16]

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[14] In fact, no agency attempted to cap the pay of employees whose "effective dates," within the meaning of 5 U.S.C. § 5344, were prior to September 30, 1978, the beginning of the 1979 fiscal year. This fact, petitioners submit, demonstrates that no agency, nor Congress, viewed the prevailing rate statute as operating in the manner envisioned by the Court of Appeals.

[15] See discussion, *supra*, at 10-12.

[16] See discussion, *infra* at 15-19.

3. The Court of Appeals overlooked petitioners' main contention that Congress did not intend to cap the pay of the employees within the six wage areas at issue in this case. In these localities, unlike the approximately 135 other wage areas, the "effective dates" within the meaning of 5 U.S.C. § 5344 preceded the effective date of the pay cap.

This Court has stated: "Retroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apartments Co.* v. *Commissioner of Internal Revenue*, 323 U.S. 141, 164; 65 S. Ct. 172, 185 (1944). This principle was reiterated in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 98 S. Ct. 2279 (1978):

> ["'R]epeals by implication are not favored.'" *Morton* v. *Mancari*, 417 U.S. 535, 549, 94 S. Ct. 2474, 2482, 41 L.Ed. 2d 290 (1974), quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503, 56 S. Ct. 349, 352, 80 L.Ed. 351 (1936). In *Posadas* this Court held in no uncertain terms, that "the intention of the legislature to repeal must be clear and manifest." *Ibid.* See *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 456-457, 65 S. Ct. 716, 725-726, 89 L.Ed. 1051 (1945) ("Only a clear repugnancy between the old and the new [law] results in the former giving [a]way . . ."); *United States* v. *Borden Co.*, 308 U.S. 188, 198-199, 60 S. Ct. 182, 188, 84 L.Ed. 181 (1939) ("[I]ntention of the legislature to repeal 'must be clear and manifest' . . . '[A] positive repugnancy [between the old and the new laws]'"); *Wood* v. *United States*, 41 U.S. 343, 363, 10 L.Ed. 987 (1842) ("[T]here must be a positive repugnancy . . ."). In practical terms, this "cardinal rule" means that "[i]n the absence of some affirmative showing of an intention for a repeal, the only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable." *Mancari*, *supra*, 417 U.S., at 550, 94 S. Ct. at 2482.

437 U.S. at 190; 98 S. Ct. at 2299.

An interpretation giving legislation a retroactive effect is particularly disfavored in situations which would disturb economic rights. "The first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . . [A] retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the 'unequivocal and inflexible input of the terms, and the manifest intention of the legislature.' " *Greene* v. *United States*, 376 U.S. 149, 160, 84 S.Ct. 615, 621, 622 (1964).

Courts have demonstrated a particular wariness against interpreting a provision within an appropriations act to repeal an antecedent statute. As stated by this Court in the *TVA* v. *Hill* case, *supra*:

> The doctrine disfavoring repeals by implication "applies with full vigor when . . . the subsequent legislation is an appropriations measure." *Committee for Nuclear Responsibility* v. *Seaborg*, 149 U.S. App. D.C. 380, 382, 463 F. 2d 783, 785 (1971) (emphasis added); *Environmental Defense Fund* v. *Froehlke*, 473 F. 2d 346, 355 (CA8 1972). This is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an appropriations act.

437 U.S. at 191; 98 S. Ct. at 2300.

The Court of Claims, on numerous occasions, has had the opportunity to resolve the conflict between substantive legislation and appropriations bills containing provisions that purport to limit or reduce a statutory entitlement or government obligation. *See e.g.*, *New York Airways, Inc.* v. *United States*, 369 F. 2d 743 (Ct. Cl. 1966); *England* v. *United States*, 137 F. Supp. 757 (Ct. Cl. 1956); *Gibney* v. *United States*, 114 Ct. Cl. 38 (1949); *Leonard* v. *United States*, 80 Ct. Cl. 147 (1934); *Wilson*

v. *United States*, 77 Ct. Cl. 630 (1933); *Danford* v. *United States*, 62 Ct. Cl. 285 (1926); and *Strong* v. *United States*, 60 Ct. Cl. 627 (1925). *Cf. Lovett* v. *United States*, 66 F. Supp. 142 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303, 66 S. Ct. 1073 (1946). These decisions demonstrate that provisions within appropriations bills, which could have the effect of amending or repealing statutory provisions affecting the government's financial obligations, are to be construed narrowly.[17]

In this case, the pay cap provision is included within the general appropriations act for the 1979 fiscal year. Although section 614 of that act references October 1, 1978, as the starting date for the pay cap, and September 30, 1979, as the end date, the use of these dates, rather than demonstrating a manifest intent that an employee's wage increase would be "rolled back" to the

[17] In *Leonard* v. *United States*, *supra*, a case involving a purported attempt to limit the pay and the number of positions at the U.S. Military Academy, the Court of Claims stated: "In determining which of two constructions shall be adopted, it is always proper and generally necessary to consider which is the more reasonable and likely to have been intended [by Congress]." 80 Ct. Cl. at 151. In that case, the Court refused to require slavish compliance with the technical wording of an appropriations bill. In this connection, note that the law is clear that once it is shown that a government obligation exists—whether statutory, contractual, or a hybrid of the two—an attempt by Congress to eliminate that obligation by language in an appropriations act does not dissolve the obligation. *United States* v. *Lovett*, 328 U.S. 303, 66 S. Ct. 1073 (1946), *aff'g*, 66 F. Supp. 142 (Ct. Cl. 1945); *New York Airways, Inc.*, *supra*; and *Louisiana* v. *Weinberger*, 369 F. Supp. 856 (E.D. La. 1973). *Cf. Perry* v. *United States*, 294 U.S. 330, 55 S. Ct. 432 (1935); *Lynch* v. *United States*, 292 U.S. 571, 54 S. Ct. 840 (1934); *Larionoff* v. *United States*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864, 97 S. Ct. 2150 (1977). This principle, on numerous occasions, has been held applicable to claims by federal employees seeking compensation due them, but not provided for in an appropriations act. *E.g.*, *Lovett*, *supra*; *Gibney*, *supra*; *Danford*, *supra*; and *Strong*, *supra*.

September 30, 1978 level for computation of wage increases, only reflects an intent to apply a cap for the period coincident with the dates for the commencement and termination of the 1979 fiscal year. Further, in this regard note that a construction, retroactively diminishing the employees' entitlement to the survey-determined wage increases, would supply to Congress an intention to undertake an action which, in the collective knowledge of the government's pay and personnel management experts, is without precedent. Answers to Interrogatories by Alan K. Campbell (CSC) ¶ 4. Such a construction would be the first time "in which federal employees, by retroactive application of an Act of Congress or Presidential determination, have been denied, or suffered a diminution of, immediately receivable employment benefits such as pay, leave, insurance, or health benefits." *Id.*

Finally, the decision by the Court of Appeals ignores findings by the Comptroller General in analogous situations involving the application or attempted application of a statute retroactively to diminish a benefit acquired by a federal employee under an antecedent statute. *Civil Service Commission*, B-150041, 42 Comp. Gen. 202 (1962); *Civil Service Commission*, B-136755, 38 Comp. Gen. 103 (1958); and *Director, Bureau of the Budget*, B-105402, 31 Comp. Gen. 109 (1952).

4. The Court of Appeals did not reach the question whether it would have been lawful for Congress to require agency-employers to roll back the prevailing rate increases to the "capped" level of 5.5 percent. However, petitioners submit that Congress, simply by enactment of the pay cap, could not roll back the increases. Congress—having established by 5 U.S.C. § 5343(b) that once a pay increase went into effect, the increase could be adjusted only by a subsequent wage survey—could not divest the employees of the wage increases by the pay cap.

If this Court decides to grant certiorari and determines on the merits of the case that the employees, by operation of the prevailing rate statute had become entitled to receive wage increases ranging from 7 to 12 percent, the Court would have the opportunity to address the question: whether employees, once they acquire an entitlement to a wage increase under an antecedent statute, may be denied such an entitlement by retroactive application of a pay cap? Similarly, the Court would be able to decide the related question: whether employees, once they acquire an entitlement to a wage increase under an antecedent statute for a fixed period of time may have such increase reduced, beginning at the point a pay cap becomes law? As discussed, *supra*, at 8, this Court, in *United States* v. *Will*, has addressed similar questions relating to judicial pay. That case, however, may not be controlling in the circumstances presented here because of the plain prohibition in the Constitution against the reduction of judicial salaries during a judge's "[c]ontinuance in office." U.S. CONST. art. 3, § 1.

In *United States* v. *Larionoff*, 431 U.S. 864, 97 S. Ct. 2150 (1977), *aff'g*, 533 F. 2d 1167 (D.C. Cir. 1976), this Court addressed similar questions in the context of the entitlement of U.S. servicemen to benefits acquired under an antecedent statute. This Court held that servicemen acquired a vested right to statutory reenlistment bonuses (that purportedly were eliminated by a later statute) which could not be divested, even if the servicemen and had not yet served the reenlistment period at the time the later statute took effect. 431 U.S. at 881, 882; 97 S. Ct. at 2159, 2160.

The issues presented by this case, petitioners submit, are as important to the administration of the federal blue-collar wage system as the issues in *Will*, *supra*, and *Larionoff*, *supra*, were to the administration of the judi-

cial and military pay systems. Additionally, not only will the issues presented by this case recur in the administration of the federal blue-collar wage system, but similar issues likely will arise in other settings as the federal government attempts to realign its workforce and reduce its personnel expenditures. A decision by this Court in the instant case would provide a vehicle for the Court to establish legal guidelines for action by the federal government in this area.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1981

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2024

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Appellants

v.

ALAN K. CAMPBELL, CHAIRMAN, U.S. CIVIL SERVICE COMMISSION, *et al.*

No. 79-2025

METAL TRADES DEPARTMENT, AFL-CIO, *et al.*,
Appellants

v.

ALAN K. CAMPBELL, CHAIRMAN, U.S. CIVIL SERVICE COMMISSION, *et al.*

No. 79-2136

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*

v.

ALAN K. CAMPBELL, CHAIRMAN, U.S. CIVIL SERVICE COMMISSION, *et al.*
Appellants

No. 79-2137

METAL TRADES DEPARTMENT, AFL-CIO, *et al.*,

v.

ALAN K. CAMPBELL, CHAIRMAN,
U.S. CIVIL SERVICE COMMISSION, *et al.*
Appellants

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 78-2270 and 79-0019)

Argued October 29, 1980

Decided December 18, 1980

William J. Stone with whom *James R. Rosa* and *Robert M. Matisoff* were on the brief, for appellants in Nos. 79-2024 and 79-2025 and cross-appellees in Nos. 79-2136 and 79-2137.

Marc Richman, Attorney, Department of Justice with whom *Alice Daniel*, Assistant Attorney General, *Charles F. C. Ruff*, United States Attorney and *Robert S. Greenspan*, Attorney, Department of Justice were on the brief, for appellees in Nos. 79-2024 and 79-2025 and cross-appellants in Nos. 79-2136 and 79-2137.

Before: ROBB, EDWARDS, and GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: This case involves cross appeals from a summary judgment by the District Court. In a Memorandum Opinion and Order issued on July 26, 1979, the District Court held that, except for brief periods between October 1 and October 10, 1978, wage increases payable to appellant-employees were properly

limited to 5.5% under a wage "cap" in effect during fiscal year 1979. For the reasons set forth below, we hold that an appropriations bill passed by Congress in October 1978 effectively amended the prevailing rate statute covering appellant-employees to provide that their wages could not be increased by more than 5.5% in fiscal year 1979. Furthermore, because we hold that the appellant-employees had no vested statutory right to larger raises, we reverse the holding of the District Court granting increases in excess of 5.5% during certain limited periods between October 1 and October 10, 1978.

I.

The appellants are a group of federal blue collar workers—the so called "prevailing rate" employees—and their unions, working in six geographical "wage areas."[1] Their pay rates are governed by 5 U.S.C. §§ 5341-5350 (1976 & Supp. III 1979) [hereinafter referred to as to "prevailing rate statute"]. Section 5343, which provides a detailed scheme to set the pay rates of these workers, mandates that "[t]he pay of prevailing rate employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates." In order to adjust wages, a "lead agency" is designated to "conduct wage surveys, analyze wage survey data, and develop and establish appropriate wage schedules and rates for prevailing rate employees." *Id.* § 5343(a)(3).[2] The wage surveys are intended to

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[1] Although both the Government and the employees have appealed the District Court decision, the employees won only a minor portion of their claims. Consequently, in this opinion we refer to the employees as the appellants.

[2] The statute also provides that:

> The Office of Personnel Management shall schedule full-scale wage surveys every 2 years and shall schedule interim surveys to be conducted between each 2 consecutive full-scale wage surveys. The Office may schedule more frequent surveys when conditions so suggest.

Id. § 5343(b).

aid the Government in keeping wages for federal employees roughly in line with wages paid to comparably classified employees in the private sector.

Section 5344(a) of the prevailing rate statute additionally provides that:

> Each increase in rates of basic pay granted, pursuant to a wage survey, to prevailing rate employees is effective not later than the first day of the first pay period which begins on or after the 45th day, excluding Saturdays and Sundays, following the date the wage survey is ordered to be made.

Section 5344(b)(1) provides for retroactive payment of the pay increases to persons employed on the date of the issuance of the order granting the increase. These provisions, setting an effective date for wage increases and permitting retroactive pay increases to the effective date, prevent excessive agency delay from undermining the congressional intent to keep wages for governmental employees in line with wages for privately employed workers.

In July 1978, lead agencies conducted wage surveys in Dothan, Alabama; Tulsa, Oklahoma; Little Rock, Arkansas; Madison, Wisconsin; Columbus, Georgia; and Albany, Georgia.[3] In each instance the agency conducting the survey recommended a wage increase of between seven and twelve percent. The "effective dates" of the pay increases fell on either October 1 or October 8, 1978.[4]

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[3] The pay rates of blue collar employees located in other wage survey areas, as well as all general schedule (white collar) employees, are not in dispute.

The Defense Department was the lead agency in each city but Madison, where the Veterans Administration was the lead agency.

[4] The effective date for all appellants was October 8, except for those working in Dothan, for whom the effective date was October 1.

During this same period, between July and October 1978, Congress had been working on an appropriations bill that purported to limit pay increases for federal blue collar workers, including the appellants, to 5.5%. The House and the Senate approved the bill on October 4, 1978, 124 Cong. Rec. S17,075, H11,444 (daily ed. Oct. 4, 1978), and the President signed the bill into law on October 10,[5] shortly after the "effective dates" of the appellants' wage increases.[6]

In anticipation of the passage of the appropriations bill capping federal blue collar wage increases, none of the agencies employing the appellants had issued orders implementing increases before the bill was signed into law, even though the effective dates for wage increases had passed. Consequently, by October 10, the agencies had not determined the actual wage increases to be given under section 5343. On October 20, the Civil Service Commission[7] issued a bulletin notifying federal agencies that pay increases granted pursuant to wage surveys, with an effective date of October 1 or later, were subject to the 5.5% limitation. *See* CSC Bulletin 532-30, *re-*

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[5] *See* Pub. L. No. 95-429, 92 Stat. 1001 (1978).

[6] Section 614(a) of the appropriations bill provides:

> No . . . funds appropriated for the fiscal year [beginning October 1, 1978 and] ending September 30, 1979, . . . may be used to pay the salary or pay of any individual . . . in an amount which exceeds the rate . . . payable . . . on September 30, 1978, by more than 5.5 percent, as a result of any adjustments which take effect during such fiscal year under—
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> (3) section 5343 of Title 5 . . . , if such adjustment is granted pursuant to a wage survey (but only with respect to prevailing rate employees described in section 5342(a)(2)(A) of that Title).

[7] On January 1, 1979, the Civil Service Commission was replaced in part by the Office of Personnel Management. *See* Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36,037 (1978).

printed in J.A. at 35.[8] The agencies in this case then issued wage schedules granting increases of 5.5%, to be paid retroactively to the "effective dates" of the wage increases.

The appellants sued to enforce their alleged rights to wage increases based solely on the wage surveys under the prevailing rate statute. On cross motions for summary judgment, the District Court held that the appellants had a "vested statutory right to receive the full amount of the survey determined wage increases [from the effective date of the increase] until October 10, 1978 when the President signed the pay cap into law." *American Fed'n of Gov't Employees* v. *Campbell*, 474 F.Supp. 357, 359 (D.D.C. 1979) (footnote omitted). The District Court found that the workers' statutory right to wage survey increases had vested on the "effective date" of the wage surveys, but that "Congress has the authority to reduce the pay of the [appellants] prospectively without interfering with any of their Constitutional rights." *Id.* at 360. The District Court thus held that the appellants' wage increases were properly reduced to 5.5% after October 10. Both sides have appealed.

Because we find that the appellants did not have a vested statutory right to any wage increases until their agencies issued orders granting increases, and because no such orders were issued until after the passage of the limiting appropriations bill, we hold that the appellants were entitled to no increase in wages above the 5.5% limit set by Congress.

II.

The appellants set forth two principal arguments in support of their claim. First, they contend that it is not possible to discern a sufficiently clear congressional intent in the October 10 appropriations bill to amend *pro tanto*

[8] "J.A." refers to the Joint Appendix submitted by the parties.

the wage statute for prevailing rate employees. From this purported lack of clear intent, the appellants conclude that the appropriations bill cannot be construed to require a reduction in their statutorily mandated wage increases. Alternatively, the appellants argue that their statutory right to wage increases—based on wage surveys under the prevailing rate statute—vested on the "effective dates." Therefore, appellants urge that Congress could not lawfully deprive them of these alleged vested wage increases.

III.

In their first argument the appellants contend that the Government has not met its burden of showing that Congress intended the appropriations bill to repeal the prevailing rate statute for prevailing rate employees. They argue that the case law requires a clearer showing of congressional intent than that manifested in the bill.

The cases cited by appellants do not fully support their argument. For example, the appellants rely upon *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153 (1978), for the proposition that repeals by implication, especially in appropriations bills, are not favored. While this bare statement of the law is undoubtedly correct, the facts in *Hill* present a different picture of congressional intent than the facts in the present case. In *Hill* the Supreme Court soundly rejected the argument that continued congressional funding of the Tellico Dam—whose construction threatened the survival of the snail darter—demonstrated that Congress must have meant, by implication, to repeal the Endangered Species Act, at least as it applied to that dam. *See id.* at 189-91.[9] In the present case, by contrast,

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[9] It is significant to the holding in *Hill* that the appropriations bills for the Tellico dam made no reference to the Endangered Species Act. In this case, the prevailing rate statute is referred to specifically in the limiting appropriations bill. *See* note 6, *supra*.

the Government does not claim that Congress has repealed a substantive act by appropriating money for projects that might violate the act. Instead, Congress acted to amend *pro tanto* the substantive prevailing rate law by specific reference to that law. The "prevailing rate" scheme remained in effect, albeit with an upper limit to the percentage that wages might be increased during fiscal year 1979.

Stronger support for the appellants' position can be found in *United States* v. *Langston*, 118 U.S. 389 (1886). In that case a federal law provided that the American representative to Haiti would be paid $7,500 per year. When Congress appropriated only $5,000 for the representatives' salary, he used to recover the difference. The Supreme Court affirmed a judgment in his favor, holding that it could not discern any clear congressional intent to repeal the original statute setting the representative's salary. In reaching this result, the Court ruled that

> a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the service of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law.

Id. at 394.

In *Langston*, the appropriations bill, which had the effect of reducing the representative's salary, contained no reference to the earlier statute. In the present case, by contrast, the appropriations bill expressly limited wage increases to 5.5% for those workers whose pay is subject to adjustment "under— . . . (3) section 5343 of Title 5 . . . , if such adjustment is granted pursuant to a wage survey." The present case is thus plainly distinguishable

from *Langston* precisely because of the direct and explicit reference to the statutory scheme that set wages based on wage area surveys.[10] Unlike the statute in *Langston*, the bill in this case contains words that by clear implication, if not express statement, modified *pro tanto* the previous substantive law. Consequently, we conclude that Congress, by express reference to the earlier statute, effectively modified the prevailing rate statute to provide that wages for prevailing rate employees could not be increased by more than 5.5% for fiscal year 1979.

IV.

The question remaining before this court is whether the appellants had any vested statutory rights to uncapped wage increases. Appellants argue that on the "effective dates" of their wage increases, they acquired statutory entitlements to the wage increases derived from the wage surveys. They contend that any subsequent congressional action depriving them of their statutorily mandated wage increases would have infringed their constitutional rights.

One premise of appellants' argument is that the prevailing rate statute leaves agency officials virtually no discretion in setting wage increases. Once the wage sur-

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[10] The appellants also seek support in *New York Airways, Inc.* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966), where the Court of Claims held that "the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *Id.* at 748. Of course, in the present case we have no mere failure to appropriate funds. Rather, Congress specifically set a ceiling on wage increases, and directly referred to the prevailing rate statute as one of the substantive statutes affected by the appropriations bill. As the Court of Claims acknowledged in its opinion in *New York Airways*: "[a]s a general proposition Congress has the power to amend substantive legislation for a particular year by an appropriation act." *Id.* at 749.

veys have been analyzed, agency officials must—according to appellants—order wage increases that will put federal blue collar wages in line with wages paid to privately employed workers. As a corollary to this argument, appellants concede that they could have made no claim to any *vested* rights if the limiting appropriations bill had been signed into law before the effective dates of the wage increases under the prevailing rate statute.

Th Government argues that the public interest provisions [11] of the prevailing rate statute give agency officials broad discretion to order pay increases different from those suggested by the wage surveys. According to the Government, the wage surveys only serve to *recommend* the appropriate limits for various wage increases. The Government thus argues that the appropriations bill is entirely consistent with the prevailing rate statute in that it simply defines, for fiscal year 1979, what the public interest required. Furthermore, the Government contends that the agencies could have acted to limit wage increases for fiscal year 1979, under the public interest provisions of the prevailing rate statute, without reference to or reliance upon the appropriations bill.

When the positions of the parties are joined, several difficult questions are posed. One question focuses on appellants' claim that they suffered an infringement of constitutional right if Congress acted to *divest* them of wage increases that were given pursuant to the prevailing rate statute.[12] Another question focuses on issues of

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[11] *See* 5 U.S.C. §§ 5341, 5343(a).

[12] Appellants have argued that "the federal Government cannot constitutionally diminish its employees' entitlement to survey-determined wage increases, once vested, during the one-year period subsequent to the effective dates of the wage increases." Appellants' brief at 27. In support of this point, appellants primarily rely on *United States* v. *Larionoff*, 431 U.S. 864 (1977) and *Lynch* v. *United States*, 292 U.S. 571 (1934), although they recognize that the decision in *Larionoff* was "not based on constitutional grounds." Appellants' brief at 30.

statutory interpretation, concerning in particular the scope of an agency's authority under the public interest provisions of the prevailing rate statute to set wage increases different from those indicated by the statutory wage surveys.

Under the circumstances of this case, it is unnecessary for us to address these potentially troublesome questions. Before we consider whether Congress acted to divest appellants of wages claimed due under the prevailing rate statute, or whether the Government agencies have discretion to "cap" appellants' wage increases pursuant to the public interest provisions, we must first determine whether appellants did indeed have any vested rights to assert.[13] Since, for the reasons noted below, we find that the limiting appropriations bill was signed into law before appellants had acquired any rights to wage increases under the prevailing rate statute, we find it unnecessary to reach the additional questions raised by this appeal.

The simple question to be addressed here is whether appellants' rights to wage increases vested on the "effective date" or the "operative date" under the prevailing rate statute. The "operative date" is the date on which the agency actually issues an order setting the amount of the wage increase, and it may come either before or after the effective date. Should it come later, as it did in this case, wage increases are to be paid retroactively to the effective date. The effective date and retroactivity provisions in section 5344 of the prevailing rate statute guarantee workers the benefit of their pay increases even though their agency has delayed in issuing an order implementing the raise. However, we reject appellants'

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[13] It must be recalled that appellants have properly conceded that they could have made no claim if the limiting appropriations bill had been signed into law before their asserted rights had vested under the prevailing rate statute.

claim that workers acquire an entitlement to an undetermined raise on the effective date.[14]

Support for this conclusion can be found in House and Senate reports on the bill adding the "effective date" provision to the prevailing rate statute. For example, in H.R. Rep. No. 2207, 85th Cong., 2d Sess. (1958), a House committee reporting favorably on S. 25 [15] expressed concern that "[t]his long period [in conducting wage surveys and analyzing the data] results in the Federal employee receiving an increase in wages some 5 to 8 months following a similar increase in wages of employees in private industry." The House committee report indicated that:

> The provisions of bill S. 25 as reported will bring the wages of the Federal employee more closely in alinement with those being paid in private industry, and will tend to keep them from lagging too far behind at any time.

Id. at 2. The House committee report does not describe the effective date as anything more than a device to protect blue collar wages from "[t]he almost complete lack of efficiency in planning, programming, and conduct of wage surveys." *Id.*[16]

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[14] We stress that our conclusion on this issue is limited to a construction of the particular terms of the prevailing rate statute. We offer no opinion as to the meaning of these concepts in any other federal statute or governmental compensation program.

[15] S. 25 established "an effective date on which increases in wages resulting from wage surveys of local prevailing rates are to be paid to Federal employees." *Id.* at 1. The House committee amended S. 25 to set 45, instead of 60, workdays after the wage survey is ordered as the effective date of the increase. This provision was substantially reenacted when Congress amended the prevailing rate statute in 1972. *See* Pub. L. No. 92-392, 86 Stat. 564 (1972).

[16] *See also* S. Rep. No. 382, 85th Cong., 1st Sess. (1957). *See* Pub. L. No. 85-872, § 1, 72 Stat. 1696 (1958).

Our conclusion that the appellants had no vested rights to wage increases until the "operative date" is further supported by reference to the "public interest" clauses in the prevailing rate statute. Section 5341 provides that:

> It is the policy of Congress that rates of pay of prevailing rate employees be fixed and adjusted from time to time *as nearly as is consistent with the public interest* in accordance with prevailing rates.

(emphasis added). Section 5343(a) repeats this language nearly verbatim. Despite these references to the "public interest," counsel for appellants argued that the duty of agency officials is merely ministerial once the wage survey data have been analyzed. According to appellants, the public interest provisions allow "very little room" for adjustment, limiting agency discretion to "rounding off figures." Thus, appellants assert that wage increases must be based only on wage surveys under the prevailing rate statute.

While we need not decide the scope of the discretion available to agency officials under the public interest clauses, we conclude that the scope is greater than the appellants would permit. To give the public interest clauses the narrow meaning suggested by appellants would render superfluous these two statutory provisions, something that we cannot do. Thus, whatever interpretation is to be attributed to the public interest clause, it surely provides agency officials with some flexibility in setting wage increases. Because agency officials have some discretion, it follows that blue collar wages cannot be fixed until the agency issues an implementing order on the operative date. Only when the agency fixes and orders a raise do workers acquire a vested right to that raise.

In light of these findings, it must be held that appellants acquire a vested right to an actual wage increase

only when the agency issues an order fixing the increase. Because the agencies in this case never issued orders setting new wage rates for the appellants until after Congress had acted to amend *pro tanto* the prevailing rate statute, the appellants never acquired a statutory entitlement to specific wage increases based solely on wage survey data. Consequently, the intervening appropriations bill, capping wage increases, did not divest the appellants of any existing rights.[17]

V.

We conclude that the appropriations bill effectively capped federal blue collar wages for fiscal year 1979. Furthermore, because the workers acquire no vested rights until the operative date, when wage increases are actually ordered, and because no such orders had issued in this case, the appropriations bill did not divest the appellants of any rights. Accordingly, we affirm the District Court decision insofar as it holds that federal blue collar wages were capped after October 10; however, we reverse the decision of the District Court insofar as it holds that appellants had a vested right to uncapped wage increases between the effective dates and the date when the appropriations bill was signed into law.

So ordered.

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[17] Because of our holdings in this case, it is unnecessary for us to determine the meaning of the "public interest" provisions in §§ 5341 and 5343(a) of the prevailing rate statute. Our judgment on this issue must await our decision in the companion cases of *National Fed'n of Federal Employees, Local 1622* v. *Brown*, No. 79-2394 and *American Fed'n of Gov't Employees* v. *Brown*, No. 80-1092, both of which were argued, along with this case, on October 29, 1980.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 78-2270

September Term, 1980

No. 79-2024

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,

Appellants

v.

ALAN K. CAMPBELL, Chairman
U.S. Civil Services Commission, *et al.*

Before: Robb, Edwards and Ginsburg; Circuit Judges

ORDER

On consideration of appellants' petition for rehearing, filed January 16, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 78-2270

No. 79-2024

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,

Appellants

v.

ALAN K. CAMPBELL, Chairman
U.S. Civil Services Commission, *et al.*

Before: McGowan; Chief Judge, Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg

ORDER

Appellants' suggestion for rehearing *en banc* has been transmitted to the full court and no Judge has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Mikva did not participate in this order.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2270

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Plaintiffs

v.

ALAN K. CAMPBELL, *et al.*,
Defendants

Civil Action No. 79-19

METAL TRADES DEPARTMENT, AFL-CIO, *et al.*,
Plaintiffs

v.

ALAN K. CAMBELL, *et al.*,
Defendants

MEMORANDUM OPINION

Introduction

This matter is before the Court on cross-motions for summary judgment. Upon consideration of these motions, memoranda in support thereof and the entire record, the Court concludes that there are no genuine issues of material fact and that both motions should be denied in part and granted in part.

This action involves the consolidation of two cases concerning identical issues which were filed by two institu-

tional plaintiffs, the American Federation of Government Employees, AFL-CIO (AFGE) and the Metal Trades Department, AFL-CIO (MTD) on behalf of their members and members of the class of employees similarly affected. After AFGE was certified as representative of the class by order of this Court dated March 27, 1979, the two actions were consolidated.

Facts

During July and August 1978, wage surveys in accordance with 5 U.S.C. § 5343 were conducted in the wage areas of Dothan, Alabama; Tulsa, Oklahoma; Little Rock, Arkansas; Madison, Wisconsin; and Columbus and Albany, Georgia.[1] As a result of these surveys and by operation of 5 U.S.C. § 5344(a), pay increases in excess of 5.5% were to take effect on October 1, 1978 in the Dothan, Alabama wage area, and on October 8, 1978, in each of the other five wage areas.[2]

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[1] § 5343. Prevailing rate determinations; Wage Schedules:

(a) The pay of prevailing rate employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates . . . To carry out this subsection—

(4) the head of each agency having prevailing rate employees in a wage area shall apply, to the prevailing rate employees of that agency in that area, the wage schedules and rates established by the lead agency, or by the Office of Personnel Management, as appropriate, for prevailing rate employees in that area; and

(b) The Office of Personnel Management shall schedule full-scale wage surveys every 2 years and shall schedule interim surveys to be conducted between each 2 consecutive full-scale wage surveys. The Commission may schedule more frequent surveys when conditions so suggest.

[2] § 5344. Effective date of wage increase:

(a) Each increase in rates of basic pay granted, pursuant to a wage survey, to prevailing rate employees is effective not

On October 10, 1978, the President signed into law Pub. L. No. 95-429 (hereinafter pay cap legislation), which is set forth in the pertinent part in the margin.[3]

On October 20, 1978, the Civil Service Commission issued CSC Bulletin 532-30. It provided that the 5.5% cap on Federal wage increases mandated by the pay cap legislation applied retroactively to wage increases with effective dates between October 1, 1978 and October 10, 1978. As a result of CSC Bulletin 532-30, the employees herein have not received the full amount of the survey determined wage increases. Instead, they have received increases of 5.5%.

The named plaintiffs and the members of the class they represent seek declaratory and mandamus relief challenging CSC Bulletin 532-30 in an effort to receive the full percentage increases determined pursuant to the aforementioned wage surveys.[4]

Discussion

The initial question the Court will discuss is whether the pay cap legislation may be applied retroactively to

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later than the first day of the first pay period which begins on or after the 45th day, excluding Saturdays and Sundays, following the date the wage survey is ordered to be made.

[3] No part of any of the funds appropriated (for fiscal year 1979) . . . may be used to pay the salary or pay of any individual . . . in an amount which exceeds the rate of salary of basic pay payable . . . on September 30, 1978, by more than 5.5%, as a result of any adjustments which take effect during (fiscal year 1979) under—

(3) Section 5343 of Title 5 . . . if such adjustment is granted pursuant to a wage survey . . . .

[4] Pursuant to Reorganization Plan No. 2, 43 F.R. 36,037 (Aug. 15, 1978), the Civil Service Commission was abolished effective January 1, 1979. Reorganization Plan No. 2 established the Office of Personnel Management and transferred to it the duties and responsibilities with respect to the federal prevailing wage rate system formerly discharged by the Civil Service Commission.

limit statutorily mandated wage increases. Plaintiffs contend that through the operation of 5 U.S.C. §§ 5343 (a) (4) and 5344(a), plaintiffs became legitimately entitled to receive the full amount of the scheduled wage increases effective October 1, 1978 for the Dothan, Alabama wage area, and October 8, 1978 for the other wage areas. They further contend that defendants had a ministerial duty to implement these wage increases and that the subsequent approval of the pay cap legislation may not displace their entitlement.

Defendants assert that the statutory language "as is consistent with the public interest" in 5 U.S.C. § 5341 *et seq.* (hereinafter the Act) provides broad agency discretion in implementing wage adjustments. Defendants argue that this broad discretion and the express statutory mandate of the pay cap legislation authorized agency heads to impose a 5.5% limit on pay increases with effective dates on or after October 1, 1978.

Defendants cite no authority in support of their contention that the government may decrease retroactively wage rates for services already performed. Indeed, defendants admit ignorance of any previous situation in which federal employees, by retroactive application of an Act of Congress or Presidential determination, have been denied, or suffered a dimunition of, immediately receivable employment benefits such as pay, leave, insurance or health benefits.

Plaintiffs have cited decisions of the Comptroller General, which hold that a federal employee who obtains an employee benefit under statutes existing at the time of the employment, obtains a vested right to that benefit which may not be disturbed retroactively. *United States Civil Service Commission*, B-150041, 42 Comp. Gen. 202 (1962); *Director, Bureau of the Budget*, B-10542, 31 Comp. Gen. 109 (1952).

The Act evinces a Congressional policy of wage parity for specified federal employees with their colleagues in the private sector.[5] It sets forth detailed procedures and requirements for implementing this policy. The legislative history of the Act discloses criticism based on the rigidity of its requirements and the lack of agency discretion it affords. H.R. Report No. 92-339, 92 Cong. Sess. (1972). Additionally, in *Blaha* v. *U.S.*, 511 F.2d 1165 (Ct. Cl. 1975), a case involving a wage determination affecting crews of marine vessels under a statutory scheme virtually identical to that of the Act herein, the Court discussed the proper role of the public interest exception at 1170:

> . . . [T]he public interest exception was written to provide flexibility to eliminate anomalies and inequities that might arise from too literal conformity to industry pay practices. It was not written to authorize a complete frustration of the Congressional scheme.

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[5] § 5341. Policy

It is the policy of Congress that rates of pay of prevailing rate employees be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and be based on principles that—

(1) there will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment in all agencies within the same local wage area;

(2) there will be relative differences in pay within a local wage area when there are substantial or recognizable differences in duties, responsibilities and qualification requirements among positions;

(3) the level of rates of pay will be maintained in line with prevailing levels for comparable work within a local wage area;

(4) the level or rates of pay will be maintained so as to attract and retain qualified prevailing rate employees.

The Court concludes that the Act provides plaintiffs with a vested statutory right to receive the full amount of the survey determined wage increases,[6] effective October 1, 1978 for the Dothan, Alabama wage area, and October 8, 1978 for the other wage areas before the Court until October 10, 1978 when the President signed the pay cap into law. This right may not be retroactively disturbed by subsequent legislation nor the public interest exception of the Act itself. Plaintiffs' pay rates were adjusted in accordance with the mandate of § 5343(b). Plaintiffs' right to receive the adjusted pay rates vested on the effective date of the raises pursuant to § 5344(a), before the pay cap became law. Defendants' duty to implement the wage increases on the effective dates or to make retroactive payment some time thereafter pursuant to § 5344(b)[7] was ministerial. The public interest exception may not be applied retroactively to disrupt the entire wage scheme set forth in the Act. Moreover, for this Court to allow defendants to deprive plaintiffs of pay due for services already performed but still owing would present serious Constitutional questions. *United States* v. *Larionoff*, 431 U.S. 864 (1977).

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[6] The Court does not reach the question of whether the relationship between plaintiffs and the government is contractual in nature.

[7] § 5344. Retroactive Pay

(b) Retroactive pay is payable by reason of an increase in rates of basic pay referred to in subsection (2) of this section only when—

(1) the individual is in the service of the Government of the United States, including service in the armed forces, or the government of the District of Columbia on the date of the issuance of the order granting the increases; or

(2) the individual retired or died during the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase and only for services performed during that period....

These Constitutional considerations are not present with regard to prospective application of the pay cap. The 5.5% ceiling applies to all services performed on or after the effective date of the pay cap legislation, October 10, 1978. It is settled that Congress has the authority to reduce the pay of the plaintiffs prospectively without interfering with any of their Constitutional rights. *See United States* v. *Larionoff, supra*, 431 U.S. at 879; *Bell* v. *United States*, 366 U.S. 393, 401 (1961); *United States* v. *Dickerson*, 310 U.S. 554 (1940); *United States* v. *Yoshida International, Inc.*, 526 F.2d 560 (1975).

An appropriate order is entered herewith and this action is dismissed.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

Dated: July 26, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2270

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Plaintiffs

v.

ALAN K. CAMPBELL, *et al.*,
Defendants

Civil Action No. 79-19

METAL TRADES DEPARTMENT, AFL-CIO, *et al.*,
Plaintiffs

v.

ALAN K. CAMBELL, *et al.*,
Defendants

ORDER

Upon consideration of the parties' cross-motions for summary judgment, the supporting memoranda and the entire record herein, it is by the Court this 26th day of July 1979,

ORDERED that plaintiffs' motion be granted and defendants' motion denied with regard to the time period from October 1, 1978 until the President signed P.L. No. 95-429 into law on October 10, 1978 with respect to the Dothan, Alabama wage area; it is further

ORDERED that plaintiffs' motion be granted and defendants' motion be denied with regard to the time period

from October 8, 1978 until the President signed P.L. No. 95-429 into law on October 10, 1978 for the Tulsa, Oklahoma; Little Rock, Arkansas; Madison, Wisconsin; and Columbus and Albany, Georgia wage areas; it is further

ORDERED that defendants' motion be granted and plaintiffs' motion denied with regard to the time period after which the President signed P.L. No. 95-429 into law; it is further

ORDERED that defendants make whole the plaintiffs for the loss of salary and any other benefits based on salary consistent with the above; and it is further

ORDERED that this action be and hereby is dismissed.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2394

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1622,
Appellant

v.

HAROLD M. BROWN, INDIVIDUALLY AND AS SECRETARY OF DEFENSE, AND THE DEPARTMENT OF DEFENSE,
Appellees

No. 80-1092

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Appellants

v.

HAROLD M. BROWN, SECRETARY OF DEFENSE, *et al.*,
Appellees

Appeal from the United States District Court for the District of Columbia

(Civil Action Nos. 78-2252, 78-2301)

Argued October 29, 1980

Decided February 18, 1981

Catherine Waelder, with whom *Janet Cooper* was on the brief, for appellant. *Bruce P. Heppen* also entered an appearance for appellant in No. 79-2394.

Mark D. Roth, with whom *James R. Rosa* was on the brief, for appellants in No. 80-1092.

Marc Richman, Attorney, Department of Justice, with whom *Alice Daniel*, Assistant Attorney General, *Charles F.C. Ruff*, United States Attorney, and *Robert S. Greenspan*, Attorney, Department of Justice, were on the brief, for appellees.

Before: ROBB, EDWARDS, and GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* GINSBURG.

Dissenting opinion filed by *Circuit Judge* ROBB.

GINSBURG, *Circuit Judge*: These cases are companion to *American Federation of Government Employees* v. *Campbell*, No. 79-2024 (D.C. Cir. December 18, 1980); they present the question whether the Secretary of Defense properly imposed a 5.5% cap for fiscal year 1979 on the pay increases of members of the class represented by plaintiff-appellants. *American Federation of Government Employees* v. *Campbell* involved federal blue-collar workers, designated "prevailing rate employees,"[1] who are paid by funds appropriated by Congress. The cases we now decide also involve federal blue-collar, prevailing rate employees. However, the workers in the instant cases are not paid with funds appropriated by Congress. Called "nonappropriated fund workers," they are paid with

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[1] Prevailing rate employees are federal employees who, like blue-collar workers in the private sector, are paid an hourly rate for their work. As defined by statute, these workers are engaged in trades or crafts or unskilled, semi-skilled, or skilled manual labor. *See* 5 U.S.C. § 5342(a)(2) (1976).

funds from other sources, mainly income generated by the organizations they serve.[2]

In *American Federation of Government Employees* v. *Campbell*, we held that in an appropriations bill signed by the President on October 10, 1978,[3] Congress effectively capped at 5.5% the fiscal year 1979 pay increases of prevailing rate employees paid with appropriated funds. That enactment, all parties agree, does not encompass nonappropriated fund workers. Nonetheless, the district court held that the Secretary of Defense properly imposed the same 5.5% cap pursuant to the administration's announced anti-inflation program.[4] Authority for executive imposition of the cap was found in the relevant "public interest" clauses of the "prevailing rate statute."[5]

We conclude that the "public interest" clauses do not bear the weight the district court placed on them. Rather, we believe that executive discretion to fix and adjust pay rates for members of the class herein is circumscribed by the principles Congress enumerated in 5 U.S.C. § 5341 (1976): (1) equal pay for equal work in all federal agencies within the same locality; (2) differences in pay

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[2] Members of the class represented by plaintiff-appellants are employed by such "nonappropriated fund instrumentalities" as Defense Department commissaries and Veterans Administration canteens.

[3] Treasury, Postal Service and General Appropriations Act, § 614(a), Pub. L. No. 95-429, 92 Stat. 1001 (1978).

[4] National Fed'n of Federal Employees v. Brown, 481 F. Supp. 704 (D.D.C. 1979); American Fed'n of Gov't Employees v. Brown, 481 F. Supp. 711 (D.D.C. 1979).

[5] 5 U.S.C. §§ 5341-5349 (1976 & Supp. III 1979). The "public interest" clauses in point appear in 5 U.S.C. §§ 5341 and 5343(a) ("pay of prevailing rate employees shall be fixed and adjusted as nearly as is consistent with the public interest in accordance with prevailing rates").

for substantial differences in duties, responsibilities, and qualifications requirement; (3) rates of pay maintained in line with rates paid locally for comparable work in the private sector; (4) rates of pay maintained at a level that attracts and retains qualified employees. If other principles are to augment, modify, or supplant this list, Congress must supply the authorization. We therefore reverse the judgments entered for the defendants and remand for further proceedings consistent with the pay-setting guidelines Congress has established. As we explain below, the 5.5% pay cap for nonappropriated fund workers might be justified under the first principle Congress supplied, equal pay for equal work in all federal agencies within the same locality. But the executive action at issue must be tied to a legislative direction giving content to the words "public interest." Congress did not authorize the executive to go outside its guidelines and attribute to those words any nonarbitrary meaning the President finds consonant with the nation's welfare.

I.

In these two cases, considered separately below and consolidated on appeal, plaintiff-appellants are two unions and two individuals; they represent a class of some 100,000 nonappropriated fund blue-collar workers employed by instrumentalities of the Department of Defense and Veterans Administration. The pay rates of the class herein are governed by 5 U.S.C. §§ 5341-5349 (1976 & Supp. III 1979) (the "prevailing rate statute"). Congressional policy for prevailing rate pay systems is set out in § 5341:

> It is the policy of Congress that rates of pay of prevailing rate employees be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and be based on principles that—

> (1) there will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment in all agencies within the same local wage area;
>
> (2) there will be relative differences in pay within a local wage area when there are substantial or recognizable differences in duties, responsibilities, and qualification requirements among positions;
>
> (3) the level of rates of pay will be maintained in line with prevailing levels for comparable work within a local wage area; and
>
> (4) the level of rates of pay will be maintained so as to attract and retain qualified prevailing rate employees.

Section 5343 of the prevailing rate statute repeats the general policy that "wages shall be adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates" and establishes a mechanism to carry out the policy. The Office of Personnel Management (OPM) defines relevant (geographical) wage areas and designates a "lead agency" for each area; the lead agency conducts a wage survey in the area, analyzes the data, and establishes "appropriate wage schedules and rates" for prevailing rate employees; all agencies with prevailing rate employees in the wage area must apply the rates established by the lead agency.

Pursuant to § 5343(a)(2), OPM's predecessor, the Civil Service Commission, defined approximately 145 wage areas and designated the Department of Defense as the lead agency for nonappropriated fund workers in the defined areas. In August and September of 1978, the Department conducted wage surveys to determine the pay rates prevailing in the private sector for workers in

the same trades and crafts as members of the class represented by plaintiff-appellants. Thereafter, the Department analyzed the data gathered in the surveys, and developed wage schedules. These schedules suggested increases for members of plaintiff-appellants' class in excess of 5.5%. The effective date of the proposed increases, pursuant to § 5344(a), was October 22, 1978.[6]

During this same period, as part of their efforts to control inflation,[7] both the President and Congress were acting to place a 5.5% cap on pay increases for, respectively, white-collar personnel and blue-collar workers paid from funds appropriated by Congress. In August 1978, the President, invoking the authority Congress granted him in 5 U.S.C. § 5305(c) (1976),[8] capped at 5.5% proposed pay increases for white-collar workers. 14 Weekly Comp. of Pres. Doc. 1480. In October 1978, in an appropriations measure, Congress imposed the 5.5% pay increase cap on appropriated fund blue-collar workers. Consistent with the President's August 1978 action, the measure also capped the pay increase for white-collar workers. Treasury, Postal Service and General Govern-

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[6] In American Fed'n of Gov't Employees v. Campbell, *supra*, slip op. at 4, 12-14, we explained that the "effective date" of a wage increase may precede the "operative date" of the increase. Employees acquire no right to a pay increase until the operative date—the date on which the agency issues an order fixing the amount of the increase. However, once the amount is fixed on the operative date, the increase is to be paid retroactively if the effective date is earlier than the operative date.

[7] *See* 14 Weekly Comp. of Pres. Doc. 1480 (Aug. 31, 1978); 124 Cong. Rec. S9865-66 (daily ed. June 27, 1978) (remarks of Sen. Eagleton).

[8] Section 5305(c) permits the President, subject to a disapproving resolution by either House, to alter recommended pay adjustments "because of national emergency or economic conditions affecting the general welfare." *See* p. 14 *infra*.

ment Appropriations Act, § 614(a), Pub. L. No. 95-429, 92 Stat. 1001 (1978).

By letter dated October 30, 1978, the Department of Defense requested Civil Service Commission advice concerning the impact of the President's anti-inflation program on wage schedules for nonappropriated fund prevailing rate workers, and it withheld issuance of the proposed schedules pending a reply to its request. On January 4, 1979, President Carter issued a memorandum to the heads of all executive departments and agencies in which he declared that in the public interest no category of federal employees should receive a pay increase exceeding 5.5% for fiscal year 1979. He directed inclusion of nonappropriated fund employees under the 5.5% cap[9] and ordered the Chairman of the Civil Service Commission and his successor, the Director of OPM, to assist agency heads in complying with his policy determination.

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[9] In his memorandum, the President stated:

> [T]here are substantial numbers of nonappropriated fund employees and other workers employed by entities of the Federal Government who are not covered by these Government-wide actions [limiting pay increases to 5.5 percent], since they are under a variety of relatively small pay systems over which [department and agency heads] have pay setting authority. In order to ensure that proposed pay increases for other pay systems do not exceed the maximums for Federal pay that the Congress and I have set, the Policy of this Administration is:
>
> > In the public interest to control inflation, each officer or employee in the executive branch who has administrative authority to set rates of pay for any Federal officers or employees should exercise authority, to the extent permissible under law, treaty or international agreement, in such a way as to ensure that no rate of pay for any category of officers or employees is increased more than 5.5 percent during fiscal year 1979.
>
> Memorandum for the Heads of Executive Departments and Agencies, Subject: Federal Pay and the Anti-Inflation Program, 15 Weekly Comp. of Pres. Doc. 8 (Jan. 4, 1979).

On February 28, 1979, OPM issued a personnel bulletin to lead agencies, including the Department of Defense, directing that wage increases for prevailing rate nonappropriated fund workers be capped at 5.5%. Beginning that same day, the Department of Defense issued wage schedules limiting to 5.5% the wage increases at issue here. Pursuant to 5 U.S.C. § 5344(b), the increases were made retroactive to October 22, 1978.

Appellants brought the two suits consolidated in this appeal seeking mandamus relief and declarations that failure to implement wage schedules proposing increases in excess of 5.5% violated both the prevailing rate statute and the due process rights of the class of workers they represent. On cross-motions for summary judgment, the district court ruled for the defendants in both actions.

II.

We turn initially to two arguments that bear swift disposition. First, appellants assert that, prior to President Carter's January 4, 1979, pay cap memorandum, the members of the class they represent had acquired vested rights to pay increases in the amounts suggested by the August and September 1978 wage surveys; denial of those increases, they contend, violated the Fifth Amendment's due process guarantee. Second, appellants claim that defendants Brown and Cleland (the Secretary of Defense and Administrator of the Veterans Administration) acted arbitrarily and capriciously because they followed the lead of the President and OPM and made no independent determination that the 5.5% cap was permissible under law and consistent with the public interest.

Appellants' due process claim has been considered and decided by this court. Our opinion in *American Federation of Government Employees* v. *Campbell, supra,* slip op. at 10-14, deals with an almost identical vested rights argument and rejects it. We held in that case that pre-

vailing rate employees acquire no right to a pay increase before the "operative date"—the date on which the agency issues an order fixing the amount of the increase. No such order issued in this case before February 28, 1979. While the increase, when ordered, was retroactive to an "effective date" of October 22, 1978, no right to an increase had vested at the time of the President's January 4, 1979, memorandum. Since we adhere to the decision in *American Federation of Government Employees* v. *Campbell*, we need dwell no further on appellants' vested rights/due process contentions.

Largely for the reasons stated by the district court, 481 F. Supp. 711, 717-18, we find nothing arbitrary in the decision of the officials involved not to go their own separate ways in light of the President's directive and OPM's instruction.[10] Within the range of choice allowed by statute, the President may direct his subordinates' choices.[11] As appellants recognize, Congress sought to assure a coordinated federal wage system and to curtail disparity in wages between employees of different agencies performing similar tasks in the same locality. *See* 5 U.S.C. § 5341(1); 125 Cong. Rec. 2107 (1972) (remarks of Sen. McGee). Such disparity would be promoted, not curtailed, were each agency head to determine independently whether the 5.5% cap was permissible under law and consistent with the public interest.

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[10] In the district court, one of the unions (National Federation of Federal Employees) consistently represented that it did not assail the Government's action in setting the 5.5% pay cap as "arbitrary and capricious." 481 F. Supp. at 709 & n.7.

[11] *See* Myers v. United States, 272 U.S. 52, 135 (1926) (President "may properly supervise and guide [executive officials'] construction of the statutes under which they act in order to secure [the] unitary and uniform execution of the laws"). Case law on the President's authority to direct agency action is sparse. For general discussion, *see* Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451 (1979).

III.

The principal question raised on behalf of the non-appropriated fund workers is novel and substantial. Congress itself did not cap the wage increases of these workers, nor did it expressly authorize the President to do so. Both sides agree that the prevailing rate statute requires wage surveys; they disagree on the leeway the executive has under the statute's public interest clauses to set wage increases different from those indicated by the wage surveys.[12]

According to the Government, the wage surveys under § 5343 serve only to recommend the appropriate limits for wage increases, and the guiding principles stated in § 5341 do not detract from the independent force of the public interest clauses. Those clauses, as the Government reads them, permit the executive to determine what wage increases are wise under all existing circumstances: the executive may take into account considerations not mentioned in the prevailing rate statute, inflation in the matter before us; indeed, the executive may treat such considerations as overriding those enumerated in the statute.[13]

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[12] The Government stresses that the public interest qualification in federal pay statutes is "well-established." H. Rep. No. 92-339, 92d Cong. 1st Sess. 11 (1971). It derives from the Civil War era (Act of July 16, 1862, ch. 184, 12 Stat. 587) and had been used for over a century at the time of the 1972 amendments to the prevailing rate pay legislation. The unions, on the other hand, note that the Government is able to cite not a single instance prior to this controversy in which the public interest qualification has been invoked to justify supplanting entirely the principle that federal pay rates be established in accordance with prevailing rates for comparable work in the private sector. Both sides agree that the public interest qualification does not "authorize a complete frustration of the Congressional scheme." Blaha v. United States, 511 F.2d 1165, 1170 (Ct. Cl. 1975).

[13] This position was apparently accepted by the district court. 481 F. Supp. at 708 (executive officials are to "exercise discretion and make policy judgments . . . in light of all relevant factors" on

While the Government uges subordination of all other provisions of the prevailing rate statute to the public interest clauses, the unions attribute to those clauses slender significance. The statute requires maintaining federal wages in line with prevailing levels for comparable work in the private sector, the unions insist. The only leeway they acknowledge relates to defining wage areas, selecting the survey methodology and the mode of analyzing the survey data, and adopting measures to "even out" distinctions between government pay practices and those of private industry in the interest of making a valid determination of comparability.

We find neither of these polar views convincing. Under the Government's view, the appropriations bill provision was unnecessary to cap the wages of appropriated fund workers; the public interest provisions of the prevailing rate statute, the Government contends, could have been used by the agencies to accomplish the same result.[14] This position encounters two formidable obsta-

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"what rates of wage increase would be wise" and the extent to which "the wage rates prevailing in the private sector can appropriately be applied to government workers").

[14] The Government argues that the legislative action is relevant to this extent: it reveals how Congress viewed the public interest, it signalled to the President the legislature's understanding that capping all federal wages at 5.5% would be entirely "consistent with the public interest" within the meaning of §§ 5341 and 5343. The unions argue *expressio unius est exclusio alterius:* Congress specifically covered prevailing rate workers paid by appropriated funds; it therefore intended that employees paid with nonappropriated funds not be subject to the pay cap.

For the reasons indicated in the text, *infra*, we reject the Government's argument that the action by Congress was essentially advisory—unnecessary to accomplish the wage increase cap. As to the unions' position, we are unable to attribute to Congress any deliberate decision to spare nonappropriated fund workers from a pay cap. The most likely explanation for the omission, Congress was dealing with appropriations; a limitation on the expenditure

cles: the legislative purpose motivating the 1972 overhaul of the pay system for prevailing rate employees; and the express authority Congress gave the President to cap the pay of white-collar workers in the public interest.

Before 1972, the prevailing rate statute set out no list of principles in § 5341, nor did it specify, as § 5343 now does, the manner in which agencies are to determine what rates prevail.[15] Senator McGee, the Senate floor manager of the bill (H.R. 9092) that Congress enacted in 1972,[16] explained that the purpose was to anchor executive decisions to statutory guidelines and policy. Referring to the then existing statute and the objective of the amendments, Senator McGee said:

> The President may at his discretion revise the system, and the 650,000 employees in the system do not have the assurance of guidelines established in law. . . . The [prevailing rate] employees are the only group in the executive branch who do not have either a formal job classification and pay system established by law or collective bargaining options. The time is long overdue for establishing such an orderly statutory system.
>
> In its simplest form, that is what H.R. 9092 does. It says that this is going to be the law when it comes to blue-collar workers. This is what the President and Civil Service Commission . . . are going to do. . . . *Guidelines are established in this bill that*

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of appropriated funds would not affect the class of workers represented here. Hence, coverage of such workers would not have been germane to the spending measure on which Congress acted. *See* Watkins & Riddick, Senate Procedure: Precedents and Practices 111 (1964).

[15] *See* Pub. L. No. 89-554, 80 Stat. 471 (1966), *as amended by* Pub. L. No. 90-83, § 1(97), 81 Stat. 220 (1967).

[16] Pub. L. No. 92-392, § 1, 86 Stat. 564 (1972).

> *shall direct the course of administrative action* . . . . The guidelines are not extensive. They will not bind the hands of the executive branch too firmly. But they will assure . . . blue-collar workers that—to borrow a phrase—yes, Virginia, there is a Congress of the United States, and there is a policy for the blue-collar employment system.[17]

Remarks by both supporters and opponents of the 1972 amendments[18] are consistent with Senator McGee's repeated plain statements that the intent was to "set standards of direction" that would control administrative practices and constrain executive discretion.[19] Given this history, it is clear that Congress meant to set, not merely to recommend, policy and principles.

While Congress did not expressly authorize the President to respond to inflation by capping the pay of prevailing rate blue-collar workers, it did provide such authorization with respect to white-collar workers. Under the Federal Pay Comparability Act, 5 U.S.C. § 5301 *et seq.* (1976 & Supp. III 1979), the President, following a procedure prescribed by Congress, is required to adjust pay rates to levels comparable with private enterprise rates. 5 U.S.C. §§ 5305(a)(2), 5301(a)(3). Based on "economic conditions affecting the general welfare," however, the President may prescribe an alternative plan for

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[17] 118 Cong. Rec. 21017 (cols. 2-3) (1972) (emphasis added).

[18] *E.g.*, *id.* at 21029-30 (remarks of Sen. Pell) (specifically stating that the bill would prevent "the arbitrary freezing of blue-collar wages to combat inflation while workers in non-government jobs were permitted wage increases"); 117 Cong. Rec. 27680 (col. 1) (1972) (remarks of Rep. White) (supporter of amendments); *id.* at 27686 (col. 1) remarks of Rep. Ford) (same); *id.* at 27670 (col. 3) (remarks of Rep. Martin) (opponent of amendments); *id.* at 27673 (col. 1) (remarks of Rep. Gross) (same).

[19] 118 Cong. Rec. 21018 (col. 2) (1972). *See id.* at 21028 (cols. 1-2).

pay adjustments. 5 U.S.C. § 5305(c)(1). The alternative plan, if presented within the time Congress set, supplants the comparability adjustments otherwise required unless either House passes a disapproving resolution within thirty days. 5 U.S.C. § 5305(c)(2), (m). *See National Treasury Employees Union* v. *Nixon*, 492 F.2d 587, 592-601 (D.C. Cir. 1974).[20] It may be that a provision authorizing adjustment of prevailing rate workers' pay based on "economic conditions affecting the general welfare," would today attract legislative support. If that is the case, Congress is equipped to take the necessary action. It is not within the province of the administration or the courts to provide the statutory amendment.

The unions' view also founders on more than one shoal. Precedent supports executive discretion under the public interest language to establish schedules that do not precisely parallel wage rates prevailing in the private sector. *See Daigle* v. *United States*, No. 264-76 (Ct. Cl. July 14, 1978) (§ 5348); *Daniels* v. *United States*, 407 F.2d 1345, 1347 (Ct. Cl. 1969) (§ 5348); *Rogers* v. *Laird*, 319 F. Supp. 1, 4 (E.D. Va. 1970) (§ 5341). Most significantly, in their zeal to maintain that 5 U.S.C. §§ 5341 and 5343 mandate, without exception, pay rates in line with those paid by private employers for comparable work, the unions disregard the very first principle Congress placed in § 5341: equal pay for equal work in all federal agencies within the same locality.

Until oral argument in this court, the Government also failed to take into account that first § 5341 principle, evenhanded treatment of federal employees performing

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[20] Unlike the prevailing rate workers' pay-setting system before us, initially scheduled pay raises under the Federal Pay Comparability Act become effective automatically absent prescription by the President of an alternative plan. National Treasury Employees Union v. Nixon, 492 F.2d 587, 601 (D.C. Cir. 1974); National Fed'n of Federal Employees, *supra*, 481 F. Supp. at 710.

"substantially equal work under similar conditions . . . in the same local wage area." Given the pay cap effectively limiting the increase for appropriated fund workers to 5.5%, it would be inconsistent with § 5341(1) for nonappropriated fund workers to remain exempt from the limitation.[21] On the other hand, § 5341(3), the principle the unions stress to the exclusion of § 5341(1), calls for rates aligned with those paid locally for comparable work in the private sector. Whether one principle should give way to the other, or whether a mid-way accommodation should be made, must be resolved in the first instance by executive officials. The sole matter appropriately resolved at this juncture by the court is whether the executive branch has correctly applied the statute that establishes its authority. We hold that it has not. Under the structure of government—the separation of powers—established by the Constitution, the President has no authority to alter policy and principles declared by Congress even if, at the time the President acts, signals from Congress suggest it would approve the President's action. *Cf. Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) ("The accretion of dangerous power . . . come[s], however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."). We must therefore reject the sole position advanced by the Government in support of the contested executive action—that the President remains free to define the "public interest" in any reason-

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[21] President Carter's January 4, 1979, memorandum, *supra* note 9, did state a purpose "to ensure that proposed pay increases for other pay systems do not exceed the maximum for Federal pay that the Congress and I have set." However, his public interest determination was placed squarely on the need "to control inflation," and did not rely on the "standards of direction" for fixing and adjusting pay established by Congress in the prevailing rate statute. *See* text at note 19 *supra*.

able manner and without reliance upon the explicit standards Congress set to constrain executive discretion.

Conclusion

We hold that the public interest clauses do not have a life of their own, separate and distinct from the guides Congress enumerated in the prevailing rate statute. We therefore conclude that the defendants acted impermissibly in capping the wages of nonappropriated fund workers solely on the basis of the President's anti-inflation program. We further hold, however, that the wage surveys made pursuant to § 5343 are nonbinding to this extent: executive officials may exercise discretion, "consistent with the public interest," to alter the rates suggested by the survey, provided that they do so within the confines of the principles of wage policy Congress established in § 5341.

In the situation before us, the Department of Defense acted on an impermissible basis. We cannot anticipate the result of a permissible exercise of executive discretion, however, for the principles of wage policy set out in § 5341 point in conflicting directions here. One principle calls for equal pay for equal work among employees of different federal agencies. Because of the congressionally imposed pay cap on the wages of blue-collar workers paid from appropriated funds, this principle would be served by imposition of the 5.5% cap. Other policies call for maintenance of a pay rate "in line with prevailing levels for comparable work within a local wage area" and sufficient to attract and retain qualified workers. These policies might lead the Defense Department to establish wage schedules at a higher rate, closer to rates paid employees in the private sector.

At oral argument the Government's counsel urged that we affirm on the ground that § 5341(1) would justify the pay cap decision at issue here. But counsel

candidly acknowledged that the Secretary grounded his decision on the broad discretion he believed was conferred by the "public interest" clauses, and not on the basis of § 5341(1). We therefore cannot assume that, if given the opportunity, the defendants necessarily would act in the manner counsel forecast. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 88, 94 (1943); *Ashland Oil, Inc.* v. *FTC*, 548 F.2d 977, 981 (D.C. Cir. 1976).[22]

We therefore reverse the judgments of the district court, declare that the pay cap determination was arrived at in a manner contrary to law, and remand for the issuance of directions that defendant-appellees take such further action, consistent with this opinion, as may be appropriate.[23]

Reversed and remanded.

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[22] We recognize the appeal of the position taken by our colleague in dissent, that it is "ritualistic" to insist that the executive advert to congressional guidelines meant to give content to the term "public interest." *See* dissenting opinion at 5. However, we find the "public interest," as the Government would have us define it (whatever is "wise in light of all relevant factors") hardly less broad or more constraining than the "equitable principles" invoked in *Chenery*.

[23] In the interim, to preserve the pay increases already accorded appellants, the pay orders issued by the Secretary following the President's January 4, 1979, memorandum shall remain in effect, retroactive to October 22, 1978.

ROBB, *Circuit Judge, dissenting:* The appellants, hereinafter referred to as plaintiffs, are two unions and two individuals representing a class of about 100,000 federal blue-collar workers employed in organizations such as Defense Department commissaries and post exchanges and Veterans Administration canteens. These workers are not paid with funds appropriated by Congress, but rather with funds received from other sources, mainly income generated by the organizations employing them. They are known as "prevailing rate employees", and like blue-collar workers paid with appropriated funds are covered by 5 U.S.C. § 5341, *et seq.*, the prevailing rate statute.

The prevailing rate statute provides:

> It is the policy of Congress that rates of pay of prevailing rate employees be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and be based on principles that—
>
> * * * *
>
> (3) The level of rates of pay will be maintained in line with prevailing levels for comparable work within a local wage area;. . . .

5 U.S.C. § 5341.

Section 5343 of the statute requires that "The pay of prevailing rate employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates." A procedure for determining prevailing rates is set out in detail.

Applying the mechanism specified by 5 U.S.C. § 5343 the Department of Defense conducted a wage survey and established for the plaintiffs' class wage schedules based upon prevailing rates. The schedule so established provided for increases ranging from 6.5 per cent to 8.9 per

cent in the pay rates for various groups in the plaintiffs' class. The effective date of the proposed increases was October 22, 1978.

In April 1978 President Carter announced that to combat inflation he would propose in fiscal year 1979 (October 1, 1978 to September 30, 1979) a 5.5 per cent limit on pay increases for federal executives or "white-collar employees." (14 Weekly Comp. of Pres. Doc. 714). The proposal was transmitted to Congress on October 31, 1978 (14 Weekly Comp. of Pres. Doc. 1480), and neither House having objected, went into effect in October 1978, pursuant to 5 U.S.C. § 5305(c).

Meanwhile, in June 1978, the Senate amended an appropriations bill so as to impose the 5.5 per cent limitation on increases for federal blue-collar workers paid from appropriated funds. This appropriations bill passed the Senate and the House on October 4, 1978 and was signed by the President October 10, 1978. It provided that no funds appropriated for the fiscal year October 1, 1978-September 30, 1979, "may be used to pay . . . any individual in an amount which exceeds the rate . . . payable . . . on September 30, 1978, by more than 5.5 percent, as a result of any adjustments which take effect during such fiscal year under . . . (3) section 5343 of title 5 . . . if such adjustment is granted pursuant to a wage survey (but only with respect to prevailing rate employees described in section 5342(a)(2)(A) of [title 5])." (P.L. 95-429, 92 Stat. 1001) The last clause of subsection (3) excluded the plaintiffs who are not paid from appropriated funds and whose rates of pay are therefore not germane to an appropriations bill.

On January 4, 1979 the President issued a "MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES" on the subject "Federal Pay and the Anti-Inflation Program". The memorandum stated:

The success of our anti-inflation effort is critical to the economic well-being of the nation. To achieve this success, it is vital that the Government, in managing its own affairs, join with the rest of the nation in a positive commitment to reducing inflationary pressures. Accordingly, I have determined that it would be inconsistent with the public interest for any category of Federal pay rates to be increased by more than 5.5 percent during fiscal year 1979.

To this end, this Administration and the Congress have frozen Federal executive pay altogether, and have placed a 5.5 percent ceiling on pay increases for most Federal workers—those under the General Schedule and related pay systems, the members of the uniformed services, and most Federal wage employees.

However, there are substantial numbers of nonappropriated fund employees and other workers employed by entities of the Federal Government who are not covered by these Government-wide actions, since they are under a variety of relatively small pay systems over which you have pay setting authority. In order to ensure that proposed pay increases for other pay systems do not exceed the maximums for Federal pay that the Congress and I have set, the policy of this Administration is:

> In the public interest to control inflation, each officer or employee in the executive branch who has administrative authority to set rates of pay for any Federal officers or employees should exercise such authority, to the extent permissible under law, treaty, or international agreement, in such a way as to ensure that no rate of pay for any category of officers or employees is increased more than 5.5 percent during fiscal year 1979.

In accordance with the President's memorandum of January 4, 1979 increases in the plaintiffs' pay were limited to 5.5 per cent, a reduction from the 6.5 to 8.9 per cent increases proposed by the wage survey.

The plaintiffs argued in the District Court and contend on this appeal that once wage schedules reflecting local prevailing rates had been developed the Secretary of Defense had "a nondiscretionary duty to implement the wage schedule figures." (Br., p. 18) The defendants say the prevailing rate statute, 5 U.S.C. § 5343, "is mandatory in nature" and does not "authorize, permit or in any fashion grant defendant the discretion to refuse to fully implement wage rates established pursuant to an appropriate wage survey. The law permits no discretion, no latitude." (Br., p. 24) The District Court rejected this argument, saying:

> The plain language of both statutes cited by plaintiff states that adjustments to increase wage schedules of prevailing rate government workers are to be made "as nearly as is consistent with the public interest." 5 U.S.C. §§ 5341, 5343(a) (1976). The inclusion of these words in the statutes indicates that Congress did not intend that prevailing rate government workers automatically receive whatever the labor market in the private sector will bear, but rather that executive branch officials exercise discretion and make policy judgments to determine precisely what rates of wage increase would be wise in light of all relevant factors.

National Federation of Federal Employees, Local, 1622 v. *Brown*, 481 F. Supp. 704, 707, 708 (D.D.C. 1979).

I think the District Court was right. In my judgment the prevailing rate statute means what it says: the executive has discretion, in the public interest, to deviate from wage schedule figures. So long as he does not abuse his discretion I think he does not exceed his authority. In

this case I cannot say the President abused his discretion; on the contrary I believe all would agree that his effort to halt the inflationary spiral of wages was a sound reason for exercising discretion to reduce wage schedule rates. He reasonably and properly concluded that the wage schedule rates were inflationary and therefore not "consistent with the public interest."

The majority holds that "the wage surveys made pursuant to § 5343 are nonbinding to this extent: executives may exercise discretion, 'consistent with the public interest,' to alter the rates suggested by the survey, provided that they do so within the confines of the principles of wage policy Congress established in § 5341." Given this holding I suppose the majority would conclude that the President properly exercised executive discretion if in his memorandum of January 4, 1979 he had recited the principles of 5 U.S.C. § 5341 and then stated that after considering these principles he had determined that a 5.5 per cent raise was all the public interest would permit. I would hold however that the President's memorandum justified his discretionary action. It explained that in the circumstances this action was necessary "[i]n order to ensure that proposed pay increases for other pay systems do not exceed the maximums for Federal pay that the Congress and I have set," and "[i]n the public interest to control inflation". In the circumstances of this case I think this was enough, that the President's order was within the scope of the "public interest" provisions of sections 5341 and 5343 and that ritualistic citation of those sections was unnecessary.

I do not agree that *SEC* v. *Chenery*, 318 U.S. 80 (1943) is apposite, as suggested by the majority. In the *Chenery* case the SEC explicitly based its order on "broad equitable principles". *Id.*, p. 87. The Supreme Court held that broad equitable principles did not sustain the Commission's action, and that although the order

might have been supported on statutory grounds it must be judged on the basis of the grounds relied upon by the Commission. In our case the President's action was explicitly based on "the public interest". This language, which I deem sufficient to invoke the authority of 5 U.S.C. § 5341 and 5343, provides an adequate basis upon which to sustain the Executive Order. Accordingly, the record before this court, unlike that in *SEC* v. *Chenery*, shows that the challenged action was based on statutory grounds. Furthermore, no party in this case suggested that the President's order was not based on the public interest provisions of 5 U.S.C. §§ 5341 and 5343; the question argued was whether the order was within the scope of those provisions.

I would affirm the judgment of the District Court.

APPENDIX E

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

The Treasury, Postal Service, and General Government Appropriations Act, 1979, 92 Stat. 1001, at Section 614, 92 Stat. 1018, provides:

> Sec. 614. (a) No part of any of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act, may be used to pay the salary or pay of any individual in any office or position in an amount which exceeds the rate of salary or basic pay payable for such office or position on September 30, 1978, by more than 5.5 percent, as a result of any adjustments which take effect during such fiscal year under—
>
> (1) section 5305 of title 5, United States Code;
>
> (2) any other provision of law if such adjustment is determined by reference to such section 5305; or
>
> (3) section 5343 of title 5, United States Code, if such adjustment is granted pursuant to a wage survey (but only with respect to prevailing rate employees described in section 5342 (a) (2) (A) of that title).
>
> (b) For the purpose of administering any provision of law, rule, or regulation which provides premium pay, retirement, life insurance, or other employee benefit, which requires any deduction or contribution, or which imposes any requirement or limitation, on the basis of a rate of salary or basic

pay, the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay.

The federal prevailing rate statute, 5 U.S.C. §§ 5340-5350, provides in pertinent part:

SUBCHAPTER IV—PREVAILING RATE SYSTEMS

§ 5341. Policy

It is the policy of Congress that rates of pay of prevailing rate employees be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and be based on principles that—

(1) there will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment in all agencies within the same local wage area;

(2) there will be relative differences in pay within a local wage area when there are substantial or recognizable differences in duties, responsibilities, and qualification requirements among positions;

(3) the level of rates of pay will be maintained in line with prevailing levels for comparable work within a local wage area; and

(4) the level of rates of pay will be maintained so as to attract and retain qualified prevailing rate employees.

§ 5342. Definitions; application

(a) For the purpose of this subchapter—

(1) "agency" means an Executive agency; but does not include—

(A) a Government controlled corporation;

(B) the Tennessee Valley Authority;

(C) the Alaska Railroad;

(D) the Virgin Islands Corporation;

(E) the Atomic Energy Commission;

(F) the Central Intelligence Agency;

(G) the Panama Canal Company;

(H) the National Security Agency, Department of Defense; or

(I) the Bureau of Engraving and Printing, except for the purposes of section 5349 of this title;

(2) "prevailing rate employees" means—

(A) an individual employed in or under an agency in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement;

(B) an employee of a nonappropriated fund instrumentality described by section 2105(c) of this title who is employed in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and

knowledge as the paramount requirement; and

(C) an employee of the Veterans' Canteen Service, Veterans' Administration, excepted from chapter 51 of this title by section 5102(c)(14) of this title who is employed in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or labor experience and knowledge as the paramount requirement; and

(3) "position" means the work, consisting of duties and responsibilities, assignable to a prevailing rate employee.

(b) (1) Except as provided by paragraphs (2) and (3) of this subsection, this subchapter applies to all prevailing rate employees and positions in or under any agency.

(2) The subchapter does not apply to employees and positions described by section 5102(c) of this title other than by—

(A) paragraph (7) of that section to the extent that such paragraph (7) applies to employees and positions other than employees and positions of the Bureau of Engraving and Printing; and

(B) paragraph (14) of that section.

(3) This subchapter, except section 5348, does not apply to officers and members of crews of vessels excepted from chapter 51 of this title by section 5102(c)(8) of this title.

(c) Each prevailing rate employee employed within any of the several States or the District of Columbia shall be a United States citizen or a bona fide resident of one of the several States or the District of Columbia unless the Secretary of Labor certifies that no United States citizen or bona fide resident of one of the several States or the District of Columbia is available to fill the particular position.

§ 5343. Prevailing rate determinations; wage schedules; night differentials

(a) The pay of prevailing rate employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. Subject to section 213(f) of title 29, the rates may not be less than the appropriate rates provided by section 206(a)(1) of title 29. To carry out this subsection—

(1) the Office of Personnel Management shall define, as appropriate—

(A) with respect to prevailing rate employees other than prevailing rate employees under paragraphs (B) and (C) of section 5342(a)(2) of this title, the boundaries of—

(i) individual local wage areas for prevailing rate employees having regular wage schedules and rates; and

(ii) wage areas for prevailing rate employees having special wage schedules and rates;

(B) with respect to prevailing rate employees under paragraphs (B) and (C) of

section 5342(a)(2) of this title, the boundaries of—

(i) individual local wage areas for prevailing rate employees under such paragraphs having regular wage schedules and rates (but such boundaries shall not extend beyond the immediate locality in which the particular prevailing rate employees are employed); and

(ii) wage areas for prevailing rate employees under such paragraphs having special wage schedules and rates;

(2) the Office of Personnel Management shall designate a lead agency for each wage area;

(3) subject to paragraph (5) of this subsection, and subsections (c)(1)-(3) and (d) of this section, a lead agency shall conduct wage surveys, analyze wage survey data, and develop and establish appropriate wage schedules and rates for prevailing rate employees;

(4) the head of each agency having prevailing rate employees in a wage area shall apply, to the prevailing rate employees of that agency in that area, the wage schedules and rates established by the lead agency, or by the Office of Personnel Management, as appropriate, for prevailing rate employees in that area; and

(5) the Office of Personnel Management shall establish wage schedules and rates for prevailing rate employees who are United States citizens employed in any area which is outside the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, the territories and possessions of the United States, and the Trust Territory of the Pacific Islands.

(b) The Office of Personnel Management shall schedule full-scale wage surveys every 2 years and shall schedule interim surveys to be conducted between each 2 consecutive full-scale wage surveys. The Office may schedule more frequent surveys when conditions so suggest.

(c) The Office of Personnel Management, by regulation, shall prescribe practices and procedures for conducting wage surveys, analyzing wage survey data, developing and establishing wage schedules and rates, and administering the prevailing rate system. The regulations shall provide—

(1) that, subject to subsection (d) of this section, wages surveyed be those paid by private employers in the wage area for similar work performed by regular full-time employees, except that, for prevailing rate employees under paragraphs (B) and (C) of section 5342(a)(2) of this title, the wages surveyed shall be those paid by private employers to full-time employees in a representative number of retail, wholesale, service, and recreational establishments similar to those in which such prevailing rate employees are employed;

(2) for participation at all levels by representatives of organizations accorded recognition as the representatives of prevailing rate of employees in every phase of providing an equitable system for fixing and adjusting the rates of pay for prevailing rate employees, including the planning of the surveys, the drafting of specifications, the selection of data collectors, the collection and the analysis of the data, and the submission of recommendations to the head of the lead agency for wage schedules and rates

and for special wage schedules and rates where appropriate;

(3) for requirements for the accomplishment of wage surveys and for the development of wage schedules and rates for prevailing rate employees, including, but not limited to—

(A) nonsupervisory and supervisory prevailing rate employees paid under regular wage schedules and rates;

(B) nonsupervisory and supervisory prevailing rate employees paid under special wage schedules and rates; and

(C) nonsupervisory and supervisory prevailing rate employees described under paragraphs (B) and (C) of section 5342(a)(2) of this title;

(4) for proper differentials, as determined by the Office, for duty involving unusually severe working conditions or unusually severe hazards;

(5) rules governing the administration of pay for individual employees on appointment, transfer, promotion, demotion, and other similar changes in employment status; and

(6) for a continuing program of maintenance and improvement designed to keep the prevailing rate system fully abreast of changing conditions, practices, and techniques both in and out of the Government of the United States.

(d) (1) A lead agency, in making a wage survey, shall determine whether there exists in the local wage area a number of comparable positions in private industry sufficient to establish wage schedules and rates for the principal types of positions for which the survey is made. The determination shall be in

writing and shall take into consideration all relevant evidence, including evidence submitted by employee organizations recognized as representative of prevailing rate employees in that area.

(2) When a lead agency determines that there is a number of comparable positions in private industry insufficient to establish the wage schedules and rates, such agency shall establish those schedules and rates on the basis of—

(A) local private industry rates; and

(B) rates paid for comparable positions in private industry in the nearest wage area that such agency determines is most similar in the nature of its population, employment, manpower, and industry to the local wage area for which the wage survey is being made.

(e) (1) Each grade of a regular wage schedule for nonsupervisor prevailing rate employees shall have 5 steps with—

(A) the first step at 96 percent of the prevailing rate;

(B) the second step at 100 percent of the prevailing rate;

(C) the third step at 104 percent of the prevailing rate;

(D) the fourth step at 108 percent of the prevailing rate; and

(E) the fifth step at 112 percent of the prevailing rate.

(2) A prevailing rate employee under a regular wage schedule who has a work perform-

ance rating of satisfactory or better, as determined by the head of the agency, shall advance automatically to the next higher step within the grade at the beginning of the first applicable pay period following his completion of—

(A) 26 calendar weeks of service in step 1;

(B) 78 calendar weeks of service in step 2; and

(C) 104 calendar weeks of service in each of steps 3 and 4.

(3) Under regulations prescribed by the Office of Personnel Management, the benefits of successive step increases shall be preserved for prevailing rate employees under a regular wage schedule whose continuous service is interrupted in the public interest by service with the armed forces or by service in essential non-Government civilian employment during a period of war or national emergency.

(4) Supervisory wage schedules and special wage schedules authorized under subsection (c)(3) of this section may have single or multiple rates or steps according to prevailing practices in the industry on which the schedule is based.

(f) A prevailing rate employee is entitled to pay at his scheduled rate plus a night differential—

(1) amounting to 7½ percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 3 p.m. and midnight; and

(2) amounting to 10 percent of that scheduled rate for regularly scheduled nonovertime

work a majority of the hours of which occur between 11 p.m. and 8 a.m.

A night differential under this subsection is a part of basic pay.

§ 5344. Effective date of wage increases; retroactive pay

(a) Each increase in rates of basic pay granted, pursuant to a wage survey, to prevailing rate employees is effective not later than the first day of the first pay period which begins on or after the 45th day, excluding Saturdays and Sundays, following the date the wage survey is ordered to be made.

(b) Retroactive pay is payable by reason of an increase in rates of basic pay referred to in subsection (a) of this section only when—

(1) the individual is in the service of the Government of the United States, including service in the armed forces, or the government of the District of Columbia on the date of the issuance of the order granting the increase; or

(2) the individual retired or died during the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase, and only for services performed during that period.

For the purpose of this subsection, service in the armed forces includes the period provided by statute for the mandatory restoration of the individual to a position, in or under the Government of the United States or the government of the District of Columbia after he is relieved from training and service in the armed forces or discharged from hospitalization following that training and service.

Subchapter S1-4 of the Federal Personnel Manual Supplement 532-1 (Office of Personnel Management) provides in pertinent part:

> a. Agencies. The head of an agency shall apply to the prevailing rate employees of his/her agency in a defined wage area the regular or special wage schedules and rates which have been established for that area under paragraph (3) of section 5343(a) or by the Civil Service Commission under paragraph (5) of section 5343(a), as appropriate.

Subchapter S3-2 of the Federal Personnel Manual Supplement 532-1 (Office of Personnel Management) provides in pertinent part:

> a. Agencies. (1) The head of each executive agency is responsible, within the policies and practices of the Federal Wage System for fixing and administering rates of pay for wage employees of his/her organization.
>
> (2) Within the policies and practices of the Federal Wage System and with the advice and assistance of local wage survey committees and the agency wage committee, each agency assigned lead-agency responsibility plans and schedules wage surveys, analyzes wage survey data, and establishes wage schedules for designated wage areas. Other agencies having wage employees in the wage area are provided schedules of wage rates established by the lead agency, and establish and administer these rates for wage employees of their organizations.
>
> (3) Each agency is responsible for insuring that its installations and activities comply with requirements of the Federal Wage System; that systems instructions and procedures are appropriately fol-

lowed; that job-grading standards and instructions concerning pay category, titling, and coding of wage jobs are expeditiously and uniformly applied; and that wage rates are properly administered for individual employees. Each agency is responsible for establishing procedures for employee job-grading appeals, for deciding these appeals expeditiously, and for acting promptly to place into effect decisions rendered within the agency or by the Civil Service Commission on appeals.

(4) The head of each agency given representation on the Federal Prevailing Rate Advisory Committee is responsible for designating or nominating an appropriate official to represent the department or agency in all Committee activities.

Subchapter S5-1 of the Federal Personnel Manual Supplement 532-1 (Office of Personnel Management) provides in pertinent part:

a. Purpose. This subchapter provides uniform instructions for carrying out wage surveys and for fixing and adjusting the pay schedules of Federal trade, craft, and labor employees consistent with the public interest in accordance with prevailing rates as required by 5 U.S.C. 5343 and 5348.

b. Wage surveys. The wage survey instructions carry out the policy established in 5 U.S.C. 5341.

c. Definitions. (1) *Wage area.* A wage area is the geographic area within which a single set of wage schedules is applied uniformly by Federal installations to covered occupations. The Civil Service Commission, with the co-operation of the agencies concerned, defines the boundaries of wage areas, and they may be changed only by the Commission.

(2) *Survey area.* A survey area is that part of a wage area within which the private enterprise establishments included in the wage survey are located and within which sufficient comparable samples can be obtained. The Civil Service Commission defines the boundaries of survey areas, and they may be changed only by the Commission.

(3) *Lead agency.* A lead agency is the agency designated by the Civil Service Commission to plan and conduct wage surveys, analyze wage survey data, and determine and issue required wage schedules for an area.

(4) *Job shop.* An establishment which usually produces no one product or service of its own, but provides a specialized function on a job order basis to other industries or individuals. The items produced most often are worked to the customer's specifications or to meet special noncontinuing needs. Employment typically is concentrated in one, or a very few, journeyman trades, and fluctuates over relatively short periods in accordance with the receipt of order. The majority of employees do not receive a full year of continuous employment, although small nucleus staff often will be retained.

d. Confidentiality of survey data. Each member of a local wage survey committee, each data collector, and any other person having access to data collected must retain this information in confidence, and is subject to disciplinary action by his/her employer upon proof of violation of confidence of data secured from private employers. Any violation by a Federal employee is reported to his employing agency and, by a participant designated by a labor organization, to the recognized union and its headquarters, and shall be cause for the lead agency immediately to remove the offending person from participation in the wage survey function.

Subchapter S5-2 of the Federal Personnel Manual Supplement 532-1 (Office of Personnel Management) provides:

a. Timing of wage surveys. Wage surveys are conducted at approximately annual intervals in a wage area. Two kinds of wage surveys are made on an alternating cycle:

(1) A full-scale survey, including development of a current sample of establishments and collection of wage data by visits to establishments, is made every second year in an area. Thus in any one-year full-scale surveys are made in about half of the areas.

(2) A wage-change survey (in which data may be collected by telephone or mail or personal contact) is made every other year using only the same employers, occupations, and weights of occupations used in computing the wage line used in the preceding full-scale survey.

b. Annual survey schedule. A nationwide schedule of wage surveys (appendix C) shows the beginning month of wage surveys to be conducted during each fiscal year. It also shows for each survey area the type of survey (full scale or wage change), and special surveys, the lead agency, and the host activity point of contact. Any changes to the schedule are determined well in advance of the beginning of each fiscal year to permit adequate lead time to prepare for surveys. The scheduling of surveys takes into consideration:

(1) The best timing in relation to wage adjustments in the principal local private enterprise establishments.

(2) Reasonable distribution of workload of the lead agency.

(3) The timing of surveys for nearby or related wage areas.

(4) Scheduling relationships with other pay surveys, especially those made by the Bureau of Labor Statistics.

Subchapter S5-11 of the Federal Personnel Manual Supplement 532-1 (Office of Personnel Management) provides in pertinent part:

a. Objective. The objective of regular wage schedules is to provide a wage-rate structure which reflects the overall pattern and level of wage rates prevailing in the wage area and provides pay distinctions in keeping with work distinctions. This objective is carried out where practicable by establishing a straight payline which provides uniform cents-an-hour pay differentials for successive grades throughout the schedule. However, where a straight payline does not meet the prevailing rate requirement reasonably well a payline is constructed which incorporates one or more turns, or elbows, as necessary to provide the best fit to the local rate structure.

b. Developing proposed payline. The statistically computed and keypoint trend lines are considered along with the following factors in developing the payline for a wage area:

(1) The desirable objective of a rate schedule providing uniform cents-an-hour pay differentials between successive grades;

(2) Relationship to the average wage rates for specific occupations represented in the survey jobs and having substantial Federal employment in an area;

(3) Current local labor market conditions in relation to principal occupations used by local installations.

c. Agency wage committee. For surveys of areas having local wage survey committees, and of interest to the agency wage committee, the committee considers the survey data, the local wage survey committee's report and recommendations, the statistical analysis and proposed pay schedules of agency staff, and any other pertinent material, and recommends wage schedules to the lead agency. The agency wage committee may recommend use of the wage line which it considers most appropriate for setting rates of pay.

d. Determining prevailing rates. The lead agency considers all information, analyses, and recommendations of the local wage survey committee or other local survey organizations, the agency's technical staff, and the agency wage committee (for surveys in areas of interest to it), and determines the prevailing rate payline for the wage area.

e. Recording bases for pay determination. The lead agency prepares a summary statement, for inclusion in the official survey file, of the analyses made and reasoning leading to its payline determinations. The summary statement:

(1) Provides full explanation for the exclusion of any data which were reported without question by the local survey organization;

(2) Explains reasons for any supplemental statistical analysis which excluded any acceptable survey data;

(3) Indicates the specific trend line computed under S5-10 which it used as the basis for its payline determination, including reasons therefore;

(4) States reasons for any departure from that trend line;

(5) Describes fully its reasons for considering any data from outside the scope of the survey, the data used, how obtained, and the relative weight given to the data in making the payline determination;

f. Computing scheduled pay rates. (1) *Computing nonsupervisory wage schedule.* In computing nonsupervisory wage schedules the rate indicated by the determined previling rate payline becomes the second rate for each respective grade. The first and third rates are computed at 96 percent and 104 percent respectively, of the second rate; the fourth rate is 108 percent; and the fifth rate is 112 percent of the second rate. All rates are stated on an hourly basis.

* * * * *

h. Developing and issuing the wage schedule.

(1) *Lead agency.*

(a) The lead agency develops and issues wage schedules based on its survey and pay determinations (see example wage schedule, appendix H). Each area wage schedule consists of:

—Name of wage area;

—Nonsupervisory wage rates;

—Leader wage rates;

—Supervisory wage rates;

—Effective date; and

—Signature of authorizing official.

(b) The lead agency distributes copies of area wage schedules to the head-

quarters of each Federal agency having wage employees within the wage area as earlier reported to the lead agency host installation by the agencies' activities within the wage area, and to the headquarters of labor organizations having exclusive recognition in the wage area and to the headquarters of other labor organizations upon request. One copy of each area wage schedule is forwarded directly to the central office and to each regional office of the Civil Service Commission. The lead agency also provides copies of wage schedules to other agencies whenever requested to cover newly established local installations.

(c) Wage schedules established under the Federal Wage System are public information. A lead agency may make available to news media and to any other interested party such information as it considers pertinent concerning new or revised wage schedules for which it is responsible.

(2) *Other employing agencies.* Upon receipt of an authorized wage schedule from a lead agency, each employing agency takes immediate steps to place the schedule into effect. An employing agency:

—Authorizes application of the pay schedule to its covered wage employees within the wage area;

—Places schedules into effect in individual installations on the date specified on the area wage schedule by the lead agency.

Subchapter S5-15 of the Federal Personnel Manual Supplement 532-1 (Office of Personnel Management) provides:

> a. Statutory time limits. Each increase in rates of basic pay granted pursuant to a wage survey is required to be placed into effect for all wage employees subject to the wage schedule, whether employees of the lead agency or other agencies, not later than the first day of the first pay period which begins on or after the 45th day, excluding Saturdays and Sundays, following the date on which the wage survey was ordered to be made. (5. U.S.C. 5344)
>
> b. Uniform effective dates. Wage schedules are effected for wage employees of individual installations within a wage area on the date specified on the area wage schedule by the lead agency.
>
> c. Retroactive pay. (1) If the increase in rates is not actually applied within the time limitations above, the increase is payable retroactively when:
>
> (a) The person is in the service of the United States, including service in the armed forces or the government of the District of Columbia, on the date of the issuance of the order granting the increase; or
>
> (b) The person retired or died during the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase, and only for services performed during that period.
>
> (2) Service in the armed forces includes the period provided by statute for the mandatory restoration of the person to a position in or under the Government of the United States or the government of the District of Columbia after he/she is relieved

from training and service in the armed forces or discharged from hospitalization following that training and service.

(3) For the purpose of determining the amount of insurance to which an employee is entitled under chapter 87 of title 5, United States Code, each increase in rates of basic pay resulting from a prevailing rate survey and placed into effect in accordance with subparagraphs (1) and (2), above is considered effective as of the date of issuance of the order granting the increase or as of the effective date of the increase, whichever is later (FPM chapter 870)

UNITED STATES CIVIL SERVICE COMMISSION

BULLETIN

Washington, D.C. 20415
October 20, 1978

Bulletin No. 532-30

Subject: Fiscal Year 1979 Limitation on Wage Schedule Increases for Federal Wage System

Heads of Departments and Independent Establishments:

1. Under section 614 of Public Law 95-429, the Treasury, Postal Service, and General Government Appropriation Act, 1979, a 5.5 percent limitation has been placed on certain Federal pay increases, including wage schedule adjustments for appropriated fund Federal Wage System employees (language of section 614 attached). This limitation became effective on October 1, 1978, and will remain in effect through September 30, 1979.

2. This bulletin provides instructions for implementing the limitation on wage schedule adjustments. These instructions are applicable to each Executive agency and military department responsible for establishing rates of basic pay for appropriated fund prevailing rate employees under section 5343 of title 5, United States Code. These instructions supersede any prior Commission or agency regulations or instructions concerning the fixing and adjusting of pay for appropriated fund prevailing rate employees (as defined in section 5342(a)(2)(A) of title 5), to the extent inconsistent with these instructions.

3. *Wage schedules subject to limitation.* All appropriated fund wage schedules which are issued pursuant to a wage survey under the authority of section 5343 of title 5, United States Code, and in accordance with FPM Supplement 532-1 are subject to the 5.5 percent limitation. The limitation also applies to wage schedules produced by

reference to schedules adjusted pursuant to wage surveys, and to wage schedules that have been temporarily set aside from the Federal Wage System pending study by the Federal Prevailing Rate Advisory Committee.

4. *Procedure for constructing wage schedules.* Each appropriated fund wage schedule with an effective date of October 1, 1978, or later (through September 30, 1979) issued pursuant to a wage survey should be constructed in accordance with normal procedures in FPM Supplement 532-1.

The rates established under these procedures will be paid unless payline rates exceed the previous scheduled payline rates at any grade by more than 5.5 percent in which case payline rates reflecting an increase of 5.5 percent (rounded to the nearest cent) at each such grade will be established. The step rates for each grade will be generated from the new payline rates using normal procedures and the resulting schedule will be effective on the normal effective date.

5. *Other actions not affected.* It should be noted that the 5.5 percent limitation under Public Law 95-429 applies only to appropriated fund wage schedule adjustments granted pursuant to a wage survey. It does *not* restrict other pay changes, such as promotions, step increases, reclassifications, or any systems changes including special schedules or special rates that may result in wage schedule changes but which are not pursuant to a wage survey.

6. *Compliance with minimum wage.* Under the Fair Labor Standards Act of 1938, as amended (FLSA), the minimum wage applicable to Federal employees will increase from $2.65 per hour to $2.90 per hour on January 1, 1979. Any wage schedule which includes a rate below $2.90 an hour must be adjusted effective on January 1, 1979, so as to increase any such rate to $2.90

per hour. Since any such adjustment is not pursuant to a wage survey, it is not subject to the 5.5 percent limitation.

7. Agency headquarters offices which have questions concerning the 5.5 percent limitation may write to the following address:

Mr. Raymond C. Weissenborn
Chief, Pay Policy Division
U.S. Civil Service Commission
Washington, D.C. 20415

8. Instructions on actions to be taken after the 5.5 percent limitation expires on September 30, 1979, will be issued before that date.

/s/ Raymond Jacobson
RAYMOND JACOBSON
Executive Director

Attachment

[Attachment omitted.]

Inquiries:	Office of Wage Policy, BPS, area code 202, ext. 25454 or 632-25454
Code:	532, Pay Under the Prevailing Rate System
Distribution:	Limited
Bulletin Expires:	October 20, 1979

Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1823

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether "prevailing rate" federal employees in October 1978 were entitled to wage increases suggested by wage surveys despite legislation, mandating smaller increases, that was enacted after the effective date of any increases paid pursuant to the surveys but before such increases were ordered.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is not yet reported. The opinion of the district court (Pet. App. 17a-23a) is reported at 474 F. Supp. 357.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1980, and a petition for rehearing was denied on February 6, 1981 (Pet. App. 15a). The petition for a writ of certiorari was filed on May 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are federal blue-collar workers whose wage increases are determined by the "prevailing rate" system set forth in 5 U.S.C. (& Supp. III) 5341-5349, and unions who represent such employees (Pet. App. 3a). Under

5 U.S.C. (& Supp. III) 5343, "[t]he pay of [these] employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates." Section 5343 also prescribes a scheme to be used in determining prevailing rates. First, a "lead agency" designated by the Office of Personnel Management[1] conducts a "wage survey[]" in each geographical area (5 U.S.C. (& Supp. III) 5343(a)(3)). As the court of appeals noted (Pet. App. 3a-4a), "[t]he wage surveys are intended to aid the Government in keeping wages for federal employees roughly in line with wages paid to comparably classified employees in the private sector." The lead agency then must "analyze wage survey data, and develop and establish appropriate wage schedules and rates" for its "prevailing rate" employees (5 U.S.C. (& Supp. III) 5343(a)(3)). Other agencies "shall apply * * * the wage schedules and rates established by the lead agency" to their employees (5 U.S.C. (& Supp. III) 5343(a)(4)).

Petitioners' claim is based principally on 5 U.S.C. 5344, which provides, in part:

> (a) Each increase in rates of basic pay granted, pursuant to a wage survey, to prevailing rate employees is effective not later than the first day of the first pay period which begins on or after the 45th day * * * following the date the wage survey is ordered to be made.
>
> (b) Retroactive pay is payable by reason of an increase in rates of basic pay referred to in subsection (a) of this section only when—

---

[1]See 5 U.S.C. (& Supp. III) 5343(a)(2). At the time of the events involved in this case, this and other functions now assigned to the Office of Personnel Management were performed by the Civil Service Commission. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, Section 906(a)(2) and (3), 92 Stat. 1224.

> (1) the individual is in the service of the Government of the United States * * * on the date of the issuance of the order granting the increase; or
>
> (2) the individual retired or died during the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase * * *.

2. The lead agencies in the areas where petitioners worked conducted wage surveys in July 1978. These surveys suggested wage increases of between 7% and 12%. Under Section 5344(a), any increases granted pursuant to these surveys were to become effective on either October 1 or October 8, 1978, depending on the area (Pet. App. 4a). While the surveys were being conducted, however, Congress was considering an appropriations bill imposing a 5.5% limit on blue-collar workers' wage increases (*id.* at 5a). The bill was reported out of conference committee on September 29, 1978 (H.R. Conf. Rep. No. 95-1673, 95th Cong., 2d Sess. (1978)) and was approved by the House and Senate on October 4 (Pet. App. 5a). The President signed the bill into law on October 10. Treasury, Postal Service, and General Government Appropriations Act of 1979 ("Appropriations Act"), Pub. L. No. 95-429, 92 Stat. 1001. In anticipation of this bill, none of the agencies employing petitioners had yet determined the wage increases to be given under Section 5343 (Pet. App. 5a). On October 20, the agencies, in compliance with a Civil Service Commission Bulletin, issued wage schedules granting increases of 5.5%. These increases were paid retroactively to the "effective dates" of October 1 or October 8 (*id.* at 5a-6a).

Petitioners sued in the United States District Court for the District of Columbia, seeking to establish that they were entitled to be paid, from the "effective dates" of either October 1 or October 8, the wage increases suggested by the surveys (Pet. App. 6a). The district court held that petitioners

were entitled to "the full amount of the survey determined wage increases" only for the period between the effective dates and October 10 (*id.* at 22a). The court determined that "[t]he 5.5% ceiling applies to all services performed on or after the effective date of the pay cap legislation, October 10, 1978" (*id.* at 23a).

Both sides appealed. The court of appeals ruled against petitioners on all issues, concluding that they were entitled to no more than a 5.5% increase (Pet. App. 6a, 14a). The court held that the Appropriations Act had "effectively modified the prevailing rate statute to provide that wages for prevailing rate employees could not be increased by more than 5.5% for fiscal year 1979" (*id.* at 9a). The court further held that the Appropriations Act could constitutionally limit wages in this manner because petitioners "acquire[d] a vested right to an actual wage increase only when the agency issue[d] an order fixing the increase" (*id.* at 13a-14a). The court agreed that Section 5344 required that any wage increase be made retroactive to the "effective date" but refused to give petitioners an "entitlement to an undetermined raise on the effective date" (*id.* at 11a-12a).

ARGUMENT

1. Petitioners' "main contention" (Pet. 15) is that the Appropriations Act was not intended to alter the wage increases petitioners would have received under the prevailing rate statutes. This contention is without merit. Section 614(a) of the Appropriations Act provides, in pertinent part (92 Stat. 1018):

> No part of any of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act, may be used to pay the salary or pay of any individual in any office or position in an amount which exceeds the rate of salary or basic pay payable for such office or position on September 30, 1978, by

more than 5.5 percent, as a result of any adjustments which take effect during such fiscal year under—

* * * * *

(3) section 5343 of title 5, United States Code, if such adjustment is granted pursuant to a wage survey (but only with respect to prevailing rate employees * * *).

Petitioners acknowledge, of course, that the fiscal year ending September 30, 1979, began on October 1, 1978 (Pet. 17). Thus Congress plainly expressed its intention not to pay petitioners a wage increase greater than 5.5% at any time after October 1. Petitioners argue at length (Pet. 15-17) that repeals by implication are not favored and that appropriations statutes, in particular, should not be interpreted to override substantive legislation. But whether or not the Appropriations Act is characterized as a repeal or modification of another statute, there is no doubt that if Congress is sufficiently explicit in modifying other laws it may "accomplish its purpose by an amendment to an appropriation bill, or otherwise." *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940). See *United States* v. *Will*, No. 79-983 (Dec. 15, 1980), slip op. 20-21 & n.23. Here, as the court of appeals observed (Pet. App. 9a), the congressional intent to limit petitioners' wage increase could not have been more clearly stated.

2. Petitioners also argue (Pet. 14, 19) that under 5 U.S.C. 5344 the wage increases suggested by the wage surveys vested on the effective dates and, accordingly, that the government was constitutionally compelled to pay those increases. Petitioners appear to contend that Section 5344(a) required the agencies to grant the increases on the effective dates (see Pet. 12); once granted, petitioners assert, the increases could not be rescinded. But petitioners' interpretation of Section 5344(a) is entirely inconsistent with

Section 5344(b).[2] Section 5344(b) explicitly contemplates that an "order granting the [wage] increase" will be entered at some point *after* the effective date specified in Section 5344(a); it refers to "the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase" (5 U.S.C. 5344(b)(2)). Thus petitioners' suggestion that the increase must be ordered on the effective date is plainly wrong. Moreover, Section 5344(b) provides that an increase will be given, retroactive to the effective date, only to employees who are employed by the government on the date of the order granting the increase or who have retired or died between the effective date and the date of the order. Employees who have quit or been discharged do not receive retroactive increases. This again shows that Congress did not intend Section 5344(a) to "vest" employees with an increase on the effective date.[3]

Petitioners' reliance on *United States* v. *Larionoff*, 431 U.S. 864 (1977), is misplaced.[4] In *Larionoff*, Congress

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[2]Subsections (a) and (b) of Section 5344 were enacted together. See Act of Sept. 2, 1978, Pub. L. No. 85-872, 72 Stat. 1696.

[3]Petitioners cite legislative history (Pet. 11-12) suggesting that the purpose of Section 5344(a) is to prevent agencies from undermining Congress' intention to increase wages by delaying the increases. But this purpose is accomplished so long as the increases, when granted, are made retroactive to the effective date; here, the 5.5% increase granted to petitioners was made retroactive to the effective dates (Pet. App. 6a). In a related vein, petitioners contend (Pet. 13-14) that the court of appeals' decision will enable agencies to delay orders granting wage increases indefinitely. The delay here, however—between October 8 or 10 and October 20—was surely not indefinite or unreasonable, and the language of Section 5344(b) makes plain that Congress intended to permit some delay between the effective date and the date of the order granting the increase.

[4]*Larionoff*, in any event, turned on the interpretation of the statutes involved in that case and did not reach any constitutional issues. See 431 U.S. at 879. By the same token, the court below expressly limited its holding to "the construction of the particular terms of the prevailing rate statute" (Pet. App. 12a n.14).

granted a specific bonus, payable in the future, for what this Court called the "crystal clear" purpose (431 U.S. at 873) of inducing servicemen to reenlist. Because the bonus could not serve this purpose unless "the service member could count on receiving it if he elected to remain in the service" (*id.* at 876), the Court concluded that a subsequent statute, which did not refer to the bonus program, was not intended to rescind it by implication (*id.* at 879-882). Petitioners' claim is distinguishable on each of these points.

First, Section 5344 does not confer any specific benefit. The wage surveys do not dictate a certain increase; the lead agency must "analyze" the survey data and "develop and establish appropriate wage schedules and rates" (5 U.S.C. (& Supp. III) 5343(a)(3)). More important, employees are to receive prevailing rate increases only "as nearly as is consistent with the public interest" (5 U.S.C. (& Supp. III) 5343(a); see 5 U.S.C. 5341). Thus, until petitioners' increases were granted, they did not know what increase they would receive or, perhaps, even whether they would receive any increase at all.[5]

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[5]The District of Columbia Circuit construed the "public interest" criterion in *National Federation of Federal Employees, Local 1622* v. *Brown*, 645 F. 2d 1017 (1981) (Pet. App. 26a-48a). There, the same panel that decided the present case held, by a divided vote, that the "public interest" qualification in Section 5343(a) permits agencies only to apply the principles set forth in 5 U.S.C. 5341 and does not grant general discretion to modify the wages suggested by the survey. We disagree with the court of appeals' decision in *Brown*, but because the action taken by the government in that case could be justified under the court of appeals' construction of the "public interest" criterion (see Pet. App. 40a, 41a-42a), we did not seek further review. As the court below clearly held (Pet. App. 13a), even under this narrow construction petitioners' expectations could not have been sufficiently definite to create a constitutionally-protected interest in a specific wage increase.

The statutory scheme involved in *United States* v. *Will, supra*, is also distinguishable. There, the pay cap statutes held unconstitutional were enacted *after* the pay raise had already been ordered into effect and the higher rate had been paid. Slip op. 23, 29. Moreover, the Court in that case was concerned with the particular protections accorded judicial salaries by the Compensation Clause of Article III of the Constitution.

Second, unlike the bonus program considered in *Larionoff*, Section 5344 was not specifically designed to induce employees to continue in government service. Of course, any statute prescribing future wage increases—indeed, perhaps any statute affecting conditions of employment in the government—is partly intended to attract or retain government employees. But it is wholly implausible to suggest that the Constitution forbids Congress from ever modifying any such statute in a way unfavorable to the employees. See *United States* v. *Larionoff, supra*, 431 U.S. at 879. Thus, at least in the absence of a "specific[] * * * promise" (*id.* at 878) by Congress reflecting a clear intention (*id.* at 873) to induce employees to give or offer certain services, a statute prescribing wage increases is merely "an announced future intent" (*United States* v. *Will, supra*, slip op. 27) that is not enforceable in court.

Here, as petitioners themselves demonstrate (Pet. 10-12; see note 3, *supra*) and the court of appeals recognized (Pet. App. 11a-12a), Section 5344 was intended to remove agencies' incentive to delay wage increases. Petitioners point to no legislative history at all—let alone a "crystal clear" demonstration of congressional intent—suggesting that Section 5344 was designed to promise employees a wage increase and cannot achieve its purposes unless employees can "count on receiving" (431 U.S. at 876) the increase.[6]

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[6]In addition, the petition does not allege that at any point petitioners relied on the prospect of a certain wage increase in deciding to remain in government service. See *United States* v. *Larionoff, supra*, 431 U.S. at 867 n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1981

DOJ-1981-07

Office-Supreme Court, U.S.
FILED
JUL 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1823

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Supreme Court of the United States
OCTOBER TERM, 1980

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and

METAL TRADES DEPARTMENT, AFL-CIO, *et al.*,
Petitioners,

v.

DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY FOR PETITIONERS

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July 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY FOR PETITIONERS

Respondents suggest (Res. Br. 5, 6) that the language of 5 U.S.C. § 5344(b) demonstrates that Congress did not intend that federal blue-collar employees acquire a vested right to a prevailing rate wage increase upon expiration of the 45-day period prescribed by section 5344(a). Respondents, instead, contend that no vesting occurs until some later date when an agency issues an order authorizing payment of the wage increase. Respondents' argument is without merit.

1. Respondents' contention ignores the plain language of 5 U.S.C. § 5344(a) that "[e]ach increase . . . is

effective not later than the . . . 45th day . . . following the date the wage survey is ordered . . . ." This language evidences the intent of Congress that it is the expiration of the 45-day period, not some later date, which is determinative for vesting purposes.

2. Respondents correctly note that section 5344(b) operates so as to deny the retroactive payment of statutory wage increases to individuals whose employment with the federal government has terminated, by reason other than death or retirement, between the expiration of the 45-day period and an agency order placing such wage increases into effect. However, contrary to respondents' suggestion, the language within section 5344(b) does not detract from petitioners' position that the employees acquired a vested right to survey-determined wage increases upon expiration of the 45-day period.

The language of section 5344(b) is tied to the expiration of the 45-day period prescribed by section 5344(a), requiring agencies to make payments to employees retroactive to that date. While section 5344(b) evidences a recognition by Congress that the wheels of government turn slowly when the matter of employee pay is concerned, the language of section 5344(b) does not evidence an intent, as argued by respondents, that employees receive a vested right to an increase only upon the issuance of an agency order placing the increase into effect. If Congress had such an intention, it would have eliminated altogether the "retroactivity" language within section 5344. The exclusion from the "retroactivity" provision of individuals who have resigned from the government between the effective date of a survey-determined wage increase and the date on which an agency orders payment of an increase, petitioners suggest, was intended only to save agencies the time and trouble of identifying and locating employees who have terminated their employment during this period. Congress, petitioners sub-

mit, recognized that, in all likelihood, the "entitlement" of these employees to a wage increase would be insubstantial when weighed against the cost to the agencies of identifying and locating these individuals. It was for this reason that section 5344(b) was written, rather than to delay beyond the expiration of the 45-day period an employee's entitlement to a statutory wage increase.

For the foregoing reasons, as well as those stated in the Petition for Certiorari, petitioners pray that the Petition for Certiorari be granted.

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